Supreme Court, U.S.
FILED

001503 MAR 29 2000

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

CITY OF GAINESVILLE, FLORIDA,

Petitioner,

v.

CANNABIS ACTION NETWORK, INC.
AND KEVIN APLIN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

H. JACK KLINGENSMITH
Counsel of Record

WALTERS LEVINE BROWN
KLINGENSMITH & THOMISON, P.A.
1515 Ringling Boulevard,
Suite 900
Sarasota, FL 34236
(941) 364-8787

MARION J. RADSON, City Attorney
City of Gainesville
200 E. University Avenue,
Suite 425
Gainesville, FL 32602
(352) 334-5011

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

107pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A MUNICIPAL STREET / SIDEWALK PERMITTING ORDINANCE CONSTITUTES A CONTENT-NEUTRAL TIME, PLACE AND MANNER REGULATION, RATHER THAN A PRIOR RESTRAINT ON SPEECH WHICH MUST PROVIDE CERTAIN PROCEDURAL SAFEGUARDS.

II. WHETHER A MUNICIPAL STREET / SIDEWALK CLOSING ORDINANCE FACIALLY VIOLATES FIRST AMENDMENT FREE SPEECH RIGHTS BECAUSE THE ORDINANCE FAILS TO REQUIRE THE PERMITTING AUTHORITY TO INITIATE JUDICIAL REVIEW OF ITS OWN ACTIONS UPON DENIAL OF A PERMIT.

III. WHETHER A MUNICIPAL STREET / SIDEWALK CLOSING ORDINANCE FACIALLY VIOLATES FIRST AMENDMENT FREE SPEECH RIGHTS BECAUSE THE ORDINANCE MERELY PROVIDES PROMPT ACCESS TO OR INITIATION OF JUDICIAL REVIEW, NOT A GUARANTEE OF SPEEDY JUDICIAL RESOLUTION OR DECISION.

IV. WHETHER A MUNICIPAL STREET / SIDEWALK PERMITTING ORDINANCE FACIALLY VIOLATES FIRST AMENDMENT FREE SPEECH RIGHTS BECAUSE THE ORDINANCE DOES NOT INCLUDE AN EXPRESS PROVISION FOR PROMPT JUDICIAL DETERMINATION OR REVIEW, BUT, INSTEAD, PROVIDES IMPLIED ACCESS TO JUDICIAL SCRUTINY THROUGH A STATE'S COMMON LAW WRIT OF CERTIORARI, AND/OR A DIRECT ACTION IN FEDERAL COURT.

PARTIES TO PROCEEDING

Petitioner, City of Gainesville, Florida ("City"), is a political subdivision (municipality) of the State of Florida.

Respondent, Cannabis Action Network, Inc. ("CAN"), is a not-for-profit corporation organized under the laws of the State of Louisiana and has no known parent company or subsidiary.

Respondent, Kevin Aplin ("Aplin"), is an individual member of CAN.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATUTES INVOLVED 2

CHARTER AND ORDINANCES INVOLVED 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT FOR GRANTING WRIT 5

ARGUMENT FOR GRANTING WRIT 7

I. THE DECISION OF THE COURT OF APPEALS IS BASED ON A MISAPPLICATION OF *FREEDMAN v. MARYLAND* AND IS IN DIRECT CONFLICT WITH *FW/PBS, INC. v. CITY OF DALLAS* 7

A. The Eleventh Circuit Court of Appeals Misapplied *Freedman* to the City's Street / Sidewalk Permitting Ordinance 7

B. The Court of Appeals Decision Directly Conflicts With *FW/PBS, Inc. v. City of Dallas* 12

TABLE OF CONTENTS – Continued

Page

II. THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS 19

A. The Decision of the Eleventh Circuit Conflicts With the Decisions of the Seventh Circuit on the Same Important Issue – Whether a Content-Neutral Permitting Ordinance Is a Valid Time, Place and Manner Regulation of Speech or a Censorship Scheme 19

B. The Decision of the Eleventh Circuit Conflicts With the Decisions of Other Circuits on the Same Important Issue – Whether a Content-Neutral Permitting Ordinance Must Provide That the Government Bears the Burden of Going to Court to Uphold a Permit Denial 23

C. The Decision of the Eleventh Circuit Conflicts With the Decisions of Other Circuits on the Same Important Issue – Whether a Content-Neutral Permitting Ordinance Must Provide Prompt Judicial Determination or Only Prompt Judicial Access 24

D. The Decision of the Eleventh Circuit Conflicts With the Decisions of Other Circuits on the Same Important Issue – Whether a Content-Neutral Permitting Ordinance Must Expressly Provide for Judicial Review 27

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

11126 Baltimore Blvd. Inc. v. Prince George's County, Md., 58 F.3d 988 (4th Cir. 1995), *cert. denied*, 516 U.S. 1010 (1995) 22, 25

Alexander v. United States, 509 U.S. 544 (1993) 9

American Target Advertising, Inc. v. Giani, 199 F.3d 1241 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 34 (2000) 22

Baby Tam & Co. v. City of Las Vegas, 154 F.3d 1097 (9th Cir. 1998) 22, 25

Beal v. Stern, 184 F.3d 117 (2d Cir. 1999) 6, 23, 25

Boss Capital, Inc. v. City of Casselberry, 187 F.3d 1251 (11th Cir. 1999), *cert. denied*, 529 U.S. 1020 (2000) 14, 25, 27

Cannabis Action Network, Inc. v. City of Gainesville, 231 F.2d 761 (11th Cir. 2000) ..... *passim*

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 11

Covington v. Florida, 728 So. 2d 1195 (Fla. 4th DCA 1999) 9

Cox v. New Hampshire, 312 U.S. 569 (1941) 11

Florida Power & Light Co. v. City of Dania, 761 So. 2d 1089 (Fla. 2000) 26

Freedman v. Maryland, 380 U.S. 51 (1965) ..... *passim*

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) ... *passim*

Grand Brittain, Inc. v. City of Amarillo, Texas, 27 F.3d 1068 (5th Cir. 1994) 6, 23, 25

TABLE OF AUTHORITIES – Continued

Page

Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981) 9

Hill v. Colorado, 530 U.S. 703 (2000) 10

International Caucus of Labor Committees v. City of Montgomery, 111 F.3d 1548 (11th Cir. 1997) 11

Jews for Jesus, Inc. v. Massachusetts Bay Transportation Authority, 984 F.2d 1319 (1st Cir. 1993) 6, 23, 25

MacDonald v. City of Chicago, 2001 WL 241591 (7th Cir. March 12, 2001) ..... *passim*

MacDonald v. Safir, 206 F.3d 183 (2d Cir. 2000) 21

Narey v. Dean, 23 F.3d 1521 (11th Cir. 1994) 26

Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931) 9

Nightclubs, Inc. v. City of Paducah, 202 F.3d 884 (6th Cir. 2000) 22, 25

O'Connor v. City and County of Denver, 894 F.2d 1210 (10th Cir. 1990) 9

Patsy v. Board of Regents, 457 U.S. 496 (1982) 26

Redner v. Dean, 29 F.3d 1495 (11th Cir. 1994), *cert. denied*, 514 U.S. 1066 (1995) 27

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 13, 27

Thomas v. Chicago Park District, 227 F.3d 921 (7th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3530 (U.S. February 1, 2001) (No. 00-1249) .... *passim*

TK's Video, Inc. v. Denton County, Texas, 24 F.3d 705 (5th Cir. 1994) 22, 23

TABLE OF AUTHORITIES – Continued

Page

Vance v. Universal Amusement Co., 445 U.S. 308 (1980) 13

Van Harken v. City of Chicago, 103 F.3d 1346 (7th Cir. 1997) 26

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 12

STATUTES

Section 316.008(1)(c), Florida Statutes.....2, 9

Section 316.008(1)(g), Florida Statutes 2, 9

CHARTER

Article I, Section 1.04(15), City of Gainesville Charter.....2, 9

ORDINANCES

Section 23-42, City of Gainesville Code..... 4

Section 23-42(a), City of Gainesville Code..... 2

Section 23-42(c)(3), City of Gainesville Code..... 2

OPINIONS BELOW

On October 24, 2000, the United States Court of Appeals for the Eleventh Circuit held that the City of Gainesville's street / sidewalk permitting ordinance facially violates First Amendment speech rights because "it fails to ensure that the City will bear its burden of initiating litigation upon the denial of a [s]treet [c]losing [p]ermit."[1] The Eleventh Circuit's opinion, which is reported at 231 F.3d 761 (11th Cir. 2000), reversed an order of the United States District Court for the Northern District of Florida upholding the constitutionality of the City's ordinance. The opinion of the Eleventh Circuit Court of Appeals is reproduced in the Appendix to this Petition. (App. 1-32). The order of the district court is unpublished, but is reproduced in the Appendix. (App. 33-53).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[2] The jurisdiction of the Eleventh Circuit Court of Appeals was based on 28 U.S.C. § 1291.

---

[1] *Cannabis Action Network, Inc. v. City of Gainesville*, 231 F.2d 761, 776 (11th Cir. 2000).

[2] Petitioner timely filed a petition for rehearing en banc, but the petition was denied on December 29, 2000. (App. 54).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I, which provides in pertinent part that "Congress shall make no law abridging the freedom of speech. . . . "

STATUTES INVOLVED

Section 316.008(1)(c), Florida Statutes, which empowers municipalities to regulate or prohibit "processions or assemblages on the streets or highways, including all state or federal highways lying within their boundaries."

Section 316.008(1)(g), Florida Statutes, authorizing local authorities to restrict "the use of streets."

CHARTER AND ORDINANCES INVOLVED

Article I, Section 1.04(15), City of Gainesville Charter, conferring full police powers to the City over the entire width of right-of-ways of all streets and public ways which lie within, adjacent to, or partially within the City limits. (App. 56-63).

Section 23-42(a), City of Gainesville Code, which prohibits "persons to assemble or congregate in crowds in such numbers as to block the use of any sidewalk or street of the City without a permit from the city manager or designee, issued pursuant to this section."

Section 23-42(c)(3), City of Gainesville Code, providing that if the city manager or designee denies a permit

he or she shall request the city attorney to apply to the state circuit court for an order enjoining the applicant and other interested persons from conducting a planned event or activity.

The provisions of Ordinance § 23-42 are reproduced in the Appendix. (App. 64-68).

STATEMENT OF THE CASE

The Respondent, CAN, is a not-for-profit Louisiana corporation that purports to challenge the laws of the United States and the individual states prohibiting the possession, distribution and use of marijuana. CAN periodically conducts rallies in public places throughout the country to advance and promote its views and has conducted an annual rally in Gainesville, Florida, since 1989. Respondent, Aplin, is a member and officer of CAN.

On October 11, 1995, CAN applied to the City of Gainesville for three permits which were necessary for its annual rally. One of those permit applications requested authorization to close off a public street immediately adjacent to the public plaza where the rally would be staged. (App. 2). The city manager denied all of the permit applications on November 3, 1995. (App. 2).

On or about November 29, 1995, CAN filed suit in federal district court alleging that the City's event policy and ordinance were unconstitutional on their face and as applied. (App. 2-3). However, CAN did not attack the

constitutionality of the street closing ordinance or permit denial. (App. 3).[3]

On December 5, 1995, an evidentiary hearing was held on CAN's request for a preliminary injunction.[4] The following day (December 6, 1995), the district court determined that the City's event policy was in all likelihood facially unconstitutional and granted a preliminary injunction directing the City to issue CAN a permit to hold its rally. The City then filed a motion for clarification to determine whether the preliminary injunction also required it to issue a street closing permit. (App. 3). In response, the court entered a supplemental order requiring the City to issue a street closing permit along with the event permit. (App. 3).[5] All permits were issued immediately and CAN held its rally on December 9, 1995 as originally scheduled. (App. 3).

Approximately one year later (December 10, 1996), Respondents filed a second amended complaint incorporating new causes of action, one of which was a facial challenge to the City's street closing ordinance (§ 23-42). (App. 3).

---

[3] In 1995, applications for street closing permits were regulated by Gainesville Ordinance § 23-42. During the pendency of the case below, that ordinance was amended. The current version of Ordinance § 23-42 is the subject of this appeal.

[4] CAN amended its complaint on December 5, 1995 to add Aplin as a plaintiff.

[5] The City was also directed to issue a noise permit to CAN.

On April 24, 1997, CAN filed a motion for summary judgment asking the district court to declare the challenged street closing ordinance facially unconstitutional. In response, the City amended its street closing ordinance on September 22, 1997. CAN also controverted the amended version of Ordinance § 23-42 and on January 26, 1998, the district court ruled, in pertinent part, that the street closing ordinance, as amended, was facially constitutional. (App. 33-53).

A convoluted appeal of the district court's decision filed by CAN and Aplin eventually culminated in the Eleventh Circuit reversing the district court on the basis that the City's street closing ordinance fails to ensure that the City will bear the burden of initiating litigation upon denial of a permit. (App. 1-32). The City timely filed a petition for rehearing en banc which was denied on December 29, 2000. (App. 54-55).

SUMMARY OF ARGUMENT FOR GRANTING WRIT

This Petition presents a question of great public importance – how can local governments strike a proper balance between public safety and welfare (disruption of vehicle and pedestrian traffic, gridlock and endangerment of property) and free speech when requested to close down their streets and sidewalks for political or ideological rallies or gatherings? The Court should, therefore, grant review of the petition for the following reasons:

1) The City of Gainesville's street / sidewalk permitting ordinance is a content-neutral

time, place and manner regulation and not a prior restraint of speech. The ordinance is, therefore, not subject to the procedural safeguards mandated by *Freedman v. Maryland*, 380 U.S. 51 (1965) and *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). Accordingly, the decision of the Eleventh Circuit Court of Appeals facially invalidating the City's ordinance because it fails to require the City to initiate court proceedings to review denial of a permit is (a) based on a misapplication of *Freedman*, (b) directly conflicts with *FW/PBS* and (c) is contrary to the decisions of other circuits.

2) The decision of the Eleventh Circuit Court of Appeals likewise runs counter to or at cross purposes with the decisions of the First, Second, Fifth and Seventh Circuits holding that it is unnecessary for a permitting authority to bear the burden of initiating judicial review of its own actions in denying a permit when the permitting regulations are content-neutral.[6]

3) Even assuming for the sake of argument that the City's street / sidewalk closing ordinance were a prior restraint of speech, it

---

[6] *See Jews for Jesus, Inc. v. Massachusetts Bay Transportation Authority*, 984 F.2d 1319 (1st Cir. 1993); *Beal v. Stern*, 184 F.3d 117 (2d Cir. 1999); *Grand Brittain, Inc. v. City of Amarillo, Texas*, 27 F.3d 1068 (5th Cir. 1994); *Thomas v. Chicago Park District*, 227 F.3d 921 (7th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3530 (U.S. February 1, 2001) (No. 00-1249); *MacDonald v. City of Chicago*, 2001 WL 241591 (7th Cir. March 12, 2001).

need only provide prompt access to or initiation of judicial review, rather than a guarantee of immediate judicial resolution or decision.

4) Finally, if the City's street / sidewalk permitting ordinance were a prior restraint on speech, it would only have to provide implied access to judicial review through state common law writ of certiorari or direct action in federal court, not an express provision for prompt judicial determination or review.

ARGUMENT FOR GRANTING WRIT

I.

THE DECISION OF THE COURT OF APPEALS IS BASED ON A MISAPPLICATION OF *FREEDMAN v. MARYLAND* AND IS IN DIRECT CONFLICT WITH *FW/PBS, INC. v. CITY OF DALLAS*.

A. The Eleventh Circuit Court of Appeals Misapplied *Freedman* to the City's Street / Sidewalk Permitting Ordinance.

The Court of Appeals decision holds that a content-neutral ordinance which requires a permit to close off a public street or sidewalk for a rally is facially unconstitutional unless the ordinance complies with the three procedural safeguards set forth in *Freedman v. Maryland*, 380 U.S. 51 (1965). Specifically, the three judge panel ruled that the City of Gainesville street /sidewalk closing ordinance facially violates First Amendment speech rights because the ordinance does not require the City to initiate

judicial review whenever it denies a permit. The Petitioner respectfully submits that the court's decision is fundamentally unsound because it is based on a misapplication of *Freedman* and goes far beyond what that case sought to achieve.

Freedman v. Maryland holds only that government may not censor the content of protected speech without judicial review and authorization. 380 U.S. at 58-59. Moreover, the Supreme Court made it clear in *FW/PBS, Inc. v. City of Dallas* that the procedural safeguards enumerated in *Freedman* are intended and necessary to ensure the protection of First Amendment speech rights when confronted with a system of prior restraints. 493 U.S. at 228-230 (plurality opinion); *id.* at 244 (concurring and dissenting opinion).

The Eleventh Circuit panel correctly acknowledged that *Freedman*'s procedural safeguards only apply to regulatory schemes that censor the content of speech, i.e., regulations which constitute a prior restraint. (App. 20). However, from that premise, the court made a key error by treating the Gainesville ordinance as a prior restraint when the ordinance is in reality a time, place and manner restriction.[7]

Historically, governmental regulation of speech has been treated as a prior restraint in cases where officials controlled expression on the basis of its content or had

---

[7] Although the parties did not argue that the street / sidewalk closing ordinance was not a prior restraint, the Petitioner was wrong not to contest that issue. (App. 13).

virtually unconstrained discretion to deny speakers a permit or license. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981). "The term 'prior restraint' is used to describe administrative orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993). "Prior restraint arises where the content of the expression is subject to censorship." *O'Connor v. City and County of Denver*, 894 F.2d 1210, 1220 (10th Cir. 1990) (citing *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931)). Indeed, in *FW/PBS*, a plurality of this Court identified the "two evils" of prior restraint as unbridled discretion and delay. *Freedman*, 493 U.S. at 225-26.

In Florida, the Legislature has empowered local governments to regulate their streets and highways, including authority to prohibit or restrict their use. §§ 316.008(1)(c) and (g), Fla. Stat.; Article I, Sec. 1.04(15), City of Gainesville Charter; *Covington v. Florida*, 728 So. 2d 1195 (Fla. 4th DCA 1999). The Gainesville ordinance seeks to mitigate unreasonable interference with vehicular or pedestrian traffic by making it unlawful for persons to assemble or congregate in crowds in such numbers as to block the use of any sidewalk or street without a permit. (App. 64). The ordinance provides specific criteria and guidelines for granting or denying a permit and requires the permitting authority to act expeditiously on permit applications.[8]

---

[8] In the case below, CAN conceded that the City's ordinance satisfied the delay component of "prior restraint"

The street / sidewalk regulation challenged in this case does not authorize any judgment about the content of any speech or other expressive activity. On the contrary, permits can only be denied for a limited number of specific reasons, none of which have anything to do with the content of expressive activity or conduct. There is no danger that a permitting official will use discretion to select which political or ideological rallies will be allowed to close down City streets or sidewalks. In other words, no direct or indirect form of censorship is present in the City's street / sidewalk regulatory scheme.

The ordinance does not prohibit expressive activity and has only an incidental regulatory effect on it. Denial of a permit is not censorship, because the permitting official is not concerned about the propriety of the content or message of the proposed expressive activity, but only the activity's impact on the orderly flow of public traffic. In addition, the permitting official does not have unfettered discretion or power in granting or denying permits or delaying the permitting decision. And, because the content of expression is irrelevant to the City's decision and City officials do not have unrestrained discretion, the rationale behind the doctrine of prior restraint is absent. The Gainesville ordinance does not restrict speech, but merely regulates the time, place and manner of rallies designed to present speech. Therefore, it should be properly analyzed according to traditional time, place and manner guidelines and not the prior restraint procedural safeguards of *Freedman*. *Hill v.*

---

and did not contend that the permitting official had unbridled discretion. 231 F.3d at 773.

Colorado, 530 U.S. 703 (2000) (statute restricting the passing out of information or engaging in oral protest, education or counseling was not a prior restraint); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (law requiring issuance of permit before marchers could occupy public ways was not a prior restraint); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *MacDonald v. City of Chicago*, 2001 WL 241591, at *9 (7th Cir. March 12, 2001) (parade permit ordinance was not a prior restraint, but rather a time, place and manner restriction); *Thomas v. Chicago Park District*, 227 F.3d 921, 923-24 (7th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3530 (U.S. February 1, 2001) (No. 00-1249) (permitting regulation governing use of city parks was not a prior restraint); *International Caucus of Labor Committees v. City of Montgomery*, 111 F.3d 1548, 1551 (11th Cir. 1997) (policy banning distribution of political literature from tables on public sidewalks subject only to reasonable time, place and manner limitations).

The Petitioner is mindful that the lead (plurality) opinion in *FW/PBS* treated an adult business licensing ordinance as a prior restraint, but submits that the Court did so because that ordinance was a censorship system much like the one in *Freedman*. For example, Justice O'Connor points out that the adult business licensing ordinance "largely targets businesses purveying sexually explicit speech" and that the "scheme involved here is more onerous with respect to sexually oriented businesses than with respect to the vast majority of other businesses." *FW/PBS*, 493 U.S. at 224-25. The Court also noted that "[w]here the licensor has unlimited time within which to issue a license, the risk of arbitrary

suppression is as great as unbridled discretion" and "creates the risk of indefinitely suppressing permissible speech." *Id.* at 227. In other words, the business licensing scheme under scrutiny in *FW/PBS* was aimed at the content of expressive activity, i.e., sexually explicit speech of the businesses regulated by the licensing ordinance, and accorded licensing officials unbridled discretion through delay. Here, the Gainesville ordinance is totally devoid of such discriminatory, content-based considerations. Achieving a correct balance between the City's duty of regulating vehicle and pedestrian travel and political or ideological speech must take into account how the ordinance is applied to the particular event for which a permit is denied. Accordingly, the Petitioner suggests that the Court should consider the threshold prior restraint question anew and analyze the City's street / sidewalk closing regulation in the proper context of a content-neutral time, place and manner restriction aimed at maintaining the orderly flow of public transportation.[9]

B. The Court of Appeals Decision Directly Conflicts With *FW/PBS, Inc. v. City of Dallas.*

In *Freedman v. Maryland,* this Court held that a state board of censors had the burden of securing a prompt

---

[9] Of course, not all time, place and manner restrictions are constitutional – they must: 1) be content neutral; 2) be narrowly tailored to serve a significant governmental interest; and 3) leave open ample alternative channels for communication of the information. *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989). Had the Court of Appeals conducted the proper analysis, it would have most certainly concluded that the Gainesville ordinance satisfies each of those requirements.

judicial decision sustaining an order prohibiting exhibition of a film. *Freedman*, 380 U.S. 51 (1965). The same requirement was imposed in later censorship cases. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (rejection of application to perform rock musical "Hair" at city-leased theater was an unconstitutional prior restraint because regulatory system lacked procedural safeguards, including provision requiring the censor board to bear burden of judicial review); *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980).

Here, the Court of Appeals applied the *Freedman* constraints to Gainesville's street / sidewalk closing ordinance, notwithstanding that the ordinance implicates no direct or indirect content-based censorship. The Court treated the City's permitting regulation as a censorship scheme even though it: 1) does not target, prohibit or even consider the content or message of any proposed speech; 2) severely limits the grounds for denying a permit to those directly related to public safety, health and welfare; 3) requires a prompt decision on any permit application; and 4) is only concerned about whether the proposed activity will unreasonably interfere with the flow of vehicular or pedestrian traffic. In doing so, the Eleventh Circuit panel disregarded the last decision of this Court which addressed a content-based censorship scheme – *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). As pointed out earlier, the plurality in *FW/PBS* construed an adult business licensing ordinance as a censorship scheme because it targeted "businesses purveying sexually explicit speech," was more onerous toward sexually oriented businesses than others, and accorded the

licensing official unlimited time to rule on a license application. *FW/PBS*, 493 U.S. at 224-25, 27. In contrast to *Freedman*, *FW/PBS* did not require a licensor to bear the burden of going to court to obtain judicial approval of a license denial. In this case, however, the Court of Appeals has incorrectly imposed that same procedural safeguard on the City of Gainesville in direct conflict with *FW/PBS*.[10]

The reason proffered by the Court of Appeals for its departure from *FW/PBS* is that "[w]e believe this is a situation for 'treating unlike things differently according to their differences.' " (App. 31). Logic, however, demonstrates that if the plurality in *FW/PBS* was willing to relax government-initiated judicial determination in the context of an adult business licensing scheme which is clearly a form of content-based censorship, it surely would not impose that restriction on Gainesville's content-neutral, time, place and manner street / sidewalk regulation. *FW/PBS* instructs that prompt judicial review or determination is not even an "essential safeguard" to the "core policy underlying *Freedman*." *Freedman*, 493 U.S. at 228. Furthermore, the burden of going to court to obtain judicial review of a license or permit denial is only imposed on the government when it is "engaged in direct censorship of particular expressive material." *Freedman*, 493 U.S. at 606-07. The Gainesville regulatory ordinance

---

[10] In a prior adult business licensing case, the Eleventh Circuit relieved the regulatory authority of having to obtain court approval of license denials. *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1257 (11th Cir. 1999), *cert. denied*, 529 U.S. 1020 (2000).

is most definitely different from the censorship systems reviewed in *Freedman* and *FW/PBS*. However, that difference, e.g., no "direct censorship of particular expressive material" mandates fewer, not more, *Freedman* procedural safeguards than required in *FW/PBS*. The plurality in *FW/PBS* concluded that because the censoring ordinance under review did "not exercise discretion by passing judgment on the content of any protected speech," the "First Amendment does not require that the city bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court." *Id.* at 230. Likewise, there is no justifiable legal precedent or rationale for imposing such an onerous burden on the City of Gainesville in this case.

Nevertheless, the Eleventh Circuit panel states that the argument for relaxing the *Freedman* procedural safeguards is not as strong in this case as it was in *FW/PBS* because the permit applicant "lacks the business incentive to pursue review through the courts." (App. 31). The Petitioner submits that this rationale is misplaced and that there is no sound basis to retreat from *FW/PBS* and extend the government-initiated judicial review requirement to municipal street / sidewalk permitting decisions.

In *Freedman*, there were three specific concerns which prompted the Court to adopt a procedural safeguard that guarantees an applicant the right to engage in protected free speech until a court rules to the contrary: 1) absent a guarantee of prompt judicial determination, exhibitors could engage in self-censorship, and thus be deterred from presenting their works to censors in the first instance (*Freedman*, 380 U.S. at 59); 2) censors would be prone to determining erroneously that expression was

not constitutionally protected, an inquiry that lies within the unique province of the courts (*Freedman*, 380 U.S. at 58); and 3) the exhibitor's stake in any one picture may be insignificant to warrant protracted litigation because he can freely exhibit his film in most of the rest of the country (*Freedman*, 380 U.S. at 59). In *FW/PBS*, the Court cited two significant differences from the licensing scheme examined in *Freedman*: 1) there was no direct censorship of particular expressive material; and 2) license applicants had more incentive to pursue a license denial through the courts. *FW/PBS*, 493 U.S. at 606-07. The Court of Appeals relied exclusively on the "incentive" concern and assumed, albeit incorrectly, that an applicant for a street / sidewalk closing permit would lack the "business incentive" to challenge a permit denial in court. (App. 30-31). That assumption, however, has no factual basis or support.

To begin with, the Court of Appeals used CAN as the prototype permit applicant, despite the fact that this is a "facial" and not an "as applied" challenge. In reality, the pool of potential permit applicants is significantly larger and more diverse than a single non-profit corporation which advocates the legalization of marijuana. Indeed, many potential applicants, such as promoters and/or vendors associated with arts and crafts festivals, flea markets, music concerts, antique shows, plant and flower exhibitions and fruit and vegetable markets will have the business incentive to pursue review in court.

In addition, the facts of this case confirm CAN's own business incentive to not only legally contest a permit denial, but to also wage a five-year court challenge to Gainesville's legal right and duty to control its streets and

sidewalks. For example, the record evidence before the Court of Appeals clearly demonstrated that:

1) CAN is a corporation headquartered in Louisiana;

2) CAN promotes the commercial sale and use of cannabis;

3) CAN holds its promotional rallies throughout the United States;

4) CAN has held a rally in the public plaza in downtown Gainesville every year since 1989;

5) When originally denied a permit in 1995, CAN sought immediate judicial review in federal court;

6) CAN successfully challenged the permit denial and was issued a street closing permit in time to hold its 1995 event as originally scheduled;

7) After CAN filed suit, the City of Gainesville amended its street / sidewalk closing ordinance to correct previous defects; and

8) Notwithstanding the City's curative action, CAN has doggedly pursued its attack on the street / sidewalk ordinance for the past five years.

Finally, the Court of Appeals erroneously interpreted *FW/PBS* as holding that the mere absence of a "business incentive" to challenge a license or permit denial compels the permitting authority to seek judicial approval of its decision. The plurality in *FW/PBS* cited two significant differences from the licensing scheme in *Freedman* and decided that "[b]ecause of these differences, we conclude

that the First Amendment does not require that the city bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court." *FW/PBS*, 493 U.S. at 229-30. The plurality did not express that the absence of either one of the differences would trigger government-initiated judicial review. Moreover, the Supreme Court has never intimated, as the Court of Appeals has, that "business incentive" is the only form of inducement or stake that will exempt a permitting authority from the burden of seeking judicial review. In sum, even if for the sake of argument Gainesville's street / sidewalk permitting ordinance were a prior restraint, the legal precedent established by *FW/PBS* mandates that the City not be compelled to initiate legal proceedings whenever it denies a permit to close down its public streets and sidewalks. Any other result would effectively transfer control over those streets and sidewalks from the City to any person or organization seeking to use them at any time, under any circumstances for virtually any private purpose.

Legal arguments and precedent notwithstanding, realism and common sense require recognition of the dire consequences that municipalities will be forced to endure if *Freedman*, not *FW/PBS*, governs street / sidewalk closing permit regulations. Compelling local governments to initiate judicial review wrongly presumes that the First Amendment grants permit applicants the right and power to take over public streets and sidewalks until a court says otherwise, while in the meantime, government's substantial duty to enforce its laws to regulate accessibility to and safety of its streets and walkways is substantially undermined.

The practical result of such a ruling would be chaos. Municipalities would be compelled to grant permits to everyone who applied for one until a court held to the contrary. Courts would be flooded with claims and would become ad hoc permitting authorities. Permit applicants would be encouraged to delay the administrative permit process, secure in the knowledge of their power to close public streets and sidewalks until their case is eventually decided in court. And, local governments would be forced to commit significant additional personnel and financial resources to regain effective control of their public streets and sidewalks through lengthy, protracted court proceedings. *FW/PBS* avoids these devastating consequences for local governments while at the same time providing more than adequate procedural safeguards to protect First Amendment speech.

II.

THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

A. The Decision of the Eleventh Circuit Conflicts With the Decisions of the Seventh Circuit on the Same Important Issue – Whether a Content-Neutral Permitting Ordinance Is a Valid Time, Place and Manner Regulation of Speech or a Censorship Scheme.

The Seventh Circuit Court of Appeals has recently considered the facial constitutionality of two ordinances closely analogous to the Gainesville street / sidewalk closing regulation – one involving park permits and the other, parades. In *Thomas v. Chicago Park District*, 227 F.3d

921 (7th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3530 (U.S. February 1, 2001) (No. 00-1249), the plaintiffs presented a facial challenge to the City of Chicago's regulations governing the use of parks and requiring a permit for an assembly, parade, demonstration, sporting event or other use of a park by a group of 50 or more persons. One of the plaintiffs' arguments was that the parks ordinance imposed a "prior restraint" on the exercise of free speech because it required permission to hold a political rally in a public forum. Observing that historically "prior restraints" is censorship, the court found that the park regulations did not sanction consideration of the content of any expressive conduct or activity and specifically authorized denial of a permit on a variety of grounds, none of which had anything to do with the content of expressive activity. *Thomas*, 227 F.3d at 924-25. The court pointed out that parks are primarily for recreation rather than for political and ideological speech and that they cannot be preserved for their primary intended use if any group can hold a rally of any size and length at any time. Moreover, without regulation, the plaintiffs themselves might not be able to get their message across because of other special interest groups competing for the same public forum. Therefore, the court concluded, Chicago's park permit regulations are not a prior restraint which should be struck down on its face "without consideration of its application to a particular event for which a permit was denied." *Id.* at 924. The appropriate standard of review is, therefore, the time, place and manner analysis, not *Freedman v. Maryland*. *Id.* at 926.

In *MacDonald v. City of Chicago*, 2001 WL 241591 (7th Cir. March 12, 2001), the Seventh Circuit considered a

facial challenge to a Chicago parade permit ordinance by an advocate for the legalization of marijuana. The plaintiff applied for a parade permit to hold a march in downtown Chicago in conjunction with a political rally at a major park. However, the permit was denied on the grounds that the proposed activity would substantially and unnecessarily interfere with traffic and that there were not enough available police to ensure public safety. On appeal, the court rejected the plaintiff's assertion that the ordinance was a content-based regulation or prior restraint on speech subject to the three constitutional safeguards set forth by the Supreme Court in *Freedman v. Maryland*. The Seventh Circuit concluded that the parade permit scheme limited the discretion of government based on content-neutral criteria, and, therefore, the threat of censorship characteristic of a prior restraint was remote. The ordinance did not restrict speech, but merely regulated the time, place and manner of marches designed to present speech. *MacDonald*, 2001 WL 241591, at *9.

The Eleventh and Seventh Circuits are in direct conflict with one another over how to correctly analyze content-neutral permitting regulations. The Eleventh Circuit has adopted a "prior restraint" approach whereas the Seventh Circuit uses the time, place and manner test. Adding to the confusion and uncertainty is the fact that following *FW/PBS*, other circuits have treated permit and licensing ordinances as prior restraints of speech, subject to *Freedman* procedural safeguards, while others have considered such regulations as both time, place and manner restrictions and prior restraints. *MacDonald v. Safir*, 206 F.3d 183, 194 (2d Cir. 2000) (New York's parade

permitting ordinance is a prior restraint on speech); *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 889, 891 n.6 (6th Cir. 2000) (city's licensing scheme of adult business is a prior restraint of speech); *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1100 (9th Cir. 1998) (city's adult bookstore ordinance is a prior restraint); *American Target Advertising, Inc. v. Giani*, 199 F.3d 1241, 1250 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 34 (2000); *11126 Baltimore Blvd. Inc. v. Prince George's County, Md.*, 58 F.3d 988, 995-96 (4th Cir. 1995), *cert. denied*, 516 U.S. 1010 (1995) (valid time, place and manner regulation analyzed as a prior restraint); *TK's Video, Inc. v. Denton County, Texas*, 24 F.3d 705, 707 (5th Cir. 1994) (valid time, place and manner regulation subject to *Freedman* procedural safeguards).

As these conflicting decisions indicate, permitting and licensing ordinances have been analyzed as time, place and manner regulations, as prior restraints and as a combination of both. The result has been confusion and uncertainty for local governments attempting to balance public safety and welfare (disruption of traffic, impeding pedestrians, endangering property, gridlock) with First Amendment free speech. This case highlights the critical issue of public importance facing local governments today – how to achieve the proper balance? The Petitioner submits that the time is ripe for this Court to clarify that content-neutral permit and licensing regulations, such as Gainesville's street / sidewalk closing ordinance, are appropriately analyzed as time, place and manner regulations rather than as prior restraints.

B. The Decision of the Eleventh Circuit Conflicts With the Decisions of Other Circuits on the Same Important Issue – Whether a Content-Neutral Permitting Ordinance Must Provide That the Government Bears the Burden of Going to Court to Uphold a Permit Denial.

In this case, the Court of Appeals found the City's street / sidewalk closing ordinance facially unconstitutional because it fails to ensure that the City will bear its burden of initiating litigation upon denial of a permit. (App. 31-32). Other circuits, however, have held that content-neutral regulations, even if they are mischaracterized as prior restraints, need not include a provision requiring the government to bear the burden of going to court to deny a permit. *Thomas*, 227 F.3d at 926-27; *MacDonald*, 2001 WL 241591, at *13-14; *Jews for Jesus*, 984 F.2d at 1327; *Beal*, 184 F.3d at 128; *TK's Video*, 24 F.3d at 709; *Grand Brittain*, 27 F.3d at 1070-71.

The procedural safeguard of government-initiated judicial review was established in *Freedman v. Maryland*, a case which addressed content based censorship. Following *Freedman*, the Supreme Court in *FW/PBS* considered whether such a safeguard was needed in the context of an adult business licensing regulation and the plurality concluded that government-initiated judicial review was only required in those situations where "the censor engaged in direct censorship of particular expressive material." *FW/PBS*, 493 U.S. at 229. And, because the censoring official in *FW/PBS* did not exercise discretion by passing judgment on the content of protected speech, the Court decided that the First Amendment did not

require a city to go to court to uphold a license denial. *Id.* at 230.

Following the rationale of *FW/PBS*, the First, Second, Fifth and Seventh Circuits have held that a content-neutral permit or licensing regulation need not require the government to bear all court-related burdens when a permit or license is denied. The Eleventh Circuit, on the other hand, has misinterpreted *FW/PBS* and extended government-initiated judicial review far beyond what the Supreme Court ever intended. The Petitioner believes that the confusion and uncertainty created by this split of opinion among the circuits must be clarified if local governments are to effectively regulate their streets and sidewalks.

C. The Decision of the Eleventh Circuit Conflicts With the Decisions of Other Circuits on the Same Important Issue – Whether a Content-Neutral Permitting Ordinance Must Provide Prompt Judicial Determination or Only Prompt Judicial Access.

In this case, the Respondents argued that the Gainesville street / sidewalk closing ordinance is facially unconstitutional because it fails to guarantee "prompt judicial review," i.e., the ordinance has no explicit provision ensuring a prompt judicial determination on the merits whenever a permit is denied. (App. 23-24). The Court of Appeals acknowledged a significant split among the circuits on this issue. *Id.* at 773-74. The First, Second, Fifth and Seventh Circuits have held that for permit and licensing ordinances, "prompt judicial review" only

requires access to prompt judicial resolution.[11] Conversely, the Fourth, Sixth and Ninth Circuits have held that "prompt judicial review" requires a prompt decision on the merits.[12] The panel below claimed that in a previous decision[13] the Eleventh Circuit had joined those courts holding that judicial access, not judicial determination, constitutes prompt judicial review under *Freedman*, but quickly retreated by stating that this interpretation is limited to cases where the ordinance is a business licensing scheme. (App. 25-26). The Court then said that the Gainesville ordinance was not per se a business licensing scheme, thus creating the perception that "prompt judicial review" means judicial determination in the context of a street / sidewalk closing regulation. *Id.* at 774. The waters were muddied even more when the panel concluded that it "need not answer that difficult question today." *Id.*

---

[11] *Jews for Jesus, Inc. v. Massachusetts Bay Transportation Authority*, 984 F.2d 1319 (1st Cir. 1993); *Beal v. Stern*, 184 F.3d 117 (2d Cir. 1999); *Grand Brittain, Inc. v. City of Amarillo, Texas*, 27 F.3d 1068 (5th Cir. 1994); *Thomas v. Chicago Park District*, 227 F.3d 921 (7th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3530 (U.S. February 1, 2001) (No. 00-1249); *MacDonald v. City of Chicago*, 2001 WL 241591 (7th Cir. March 12, 2001).

[12] *11126 Baltimore Blvd. Inc. v. Prince George's County, Md.*, 58 F.3d 988 (4th Cir. 1995) *cert. denied*, 516 U.S. 1010 (1995); *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884 (6th Cir. 2000); *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998).

[13] *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1256-57 (11th Cir. 1999), *cert. denied*, 529 U.S. 1020 (2000).

The Petitioner submits that local governments desperately need an answer. If the Eleventh Circuit's decision is allowed to stand, local governments in this circuit will be forced to turn over de facto control of their public streets and sidewalks to the courts. And, it will be the courts who will then decide which groups or organizations may use those public areas for their own private purposes. In Florida, judicial review of a permit denial may be had in a state court by writ of common law certiorari. *Florida Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000) (certiorari review at circuit court level is not discretionary, but rather is a matter of right). In addition, if an applicant is denied a permit for reasons he or she believes violate the First Amendment, the applicant may immediately bring suit in federal district court, which is exactly what the Respondents did in this instance. *Patsy v. Board of Regents*, 457 U.S. 496 (1982); *Narey v. Dean*, 23 F.3d 1521 (11th Cir. 1994); *Van Harken v. City of Chicago*, 103 F.3d 1346 (7th Cir. 1997). These remedies satisfy the admonition of *FW/PBS* that "there must be the possibility of prompt judicial review in the event that a license is erroneously denied," *FW/PBS*, 493 U.S. at 223, and they are good enough for a regulation of expressive activity when that regulation is not a form of censorship, that is, does not allow the permitting authority to evaluate the content or message of the activity regulated. *MacDonald*, 2001 WL 241591, at *13 (citing *Thomas v. Chicago Park District*, 227 F.3d 921, 926 (7th Cir. 2000)).

D. The Decision of the Eleventh Circuit Conflicts With the Decisions of Other Circuits on the Same Important Issue – Whether a Content-Neutral Permitting Ordinance Must Expressly Provide for Judicial Review.

Aside from the issue of prompt judicial access versus prompt judicial determination, the Respondents in the case below contended that Gainesville's street / sidewalk closing regulation facially violates First Amendment free speech because it does not explicitly provide for prompt judicial review. (App. 24). The Court of Appeals assumed that the Supreme Court's position is that a prior restraint, if it is to meet *Freedman*'s requirements, must provide specifically for judicial review of administrative decisions to limit speech. *Id.* at 772 n.18 (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 561-562 (1975)). The panel pointed out that some courts have considered the holding in *Southeastern* to require an ordinance or regulation to explicitly provide for prompt judicial review, while others have distinguished *Southeastern* on its facts and held that implied judicial access, usually through a state's common law writ of certiorari, is sufficient. *Id.* The court even referenced one of its own adult entertainment decisions, *Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1994), *cert. denied*, 514 U.S. 1066 (1995), holding that implied judicial access does not satisfy *Freedman*'s prompt judicial review requirement.[14] Recognizing that "there is great confusion and disagreement among the federal circuits"

---

[14] In *Boss Capital v. City of Casselberry*, the Eleventh Circuit concluded that access to prompt judicial review is sufficient for licensing decisions, but the ordinance in that case expressly provided for that access. 187 F.3d at 1257.

on this issue, the Court of Appeals, nevertheless, refused to say whether or not Gainesville's content-neutral permitting ordinance must expressly provide for judicial review. However, reading between the lines, it appears that the court has staked out a position that, unless clearly stated in the ordinance, judicial review through common law certiorari proceedings or a direct action in federal district court for injunctive relief does not satisfy the "prompt judicial review" requirement. Such an interpretation rewards form over substance. Where, as here, a permit regulation is not a form of censorship, there is no logical reason or basis to hold that implied, non-expressed judicial review does not satisfy First Amendment scrutiny. Indeed, the Seventh Circuit has said that it does. *MacDonald*, 2001 WL 241591, at *13; *Thomas*, 277 F.3d at 927.

CONCLUSION

The decision reached by the Eleventh Circuit Court of Appeals in this case significantly impairs the ability of local governments to effectively ensure the safe, orderly flow of vehicle and pedestrian traffic within their jurisdiction. This Petition attempts to set forth the following issues of heightened public importance which can only be effectively clarified and resolved by this Court:

1) Is the City of Gainesville's street / sidewalk closing ordinance a content-neutral, time, place and manner regulation or a prior restraint on speech?

2) Does the City's ordinance violate free speech rights because it does not require the

City to initiate judicial review of permit denials?

3) Does the City's ordinance violate free speech rights because it provides prompt access to judicial review rather than a guarantee of a speedy judicial decision?

4) Is the City's ordinance unconstitutional because it fails to include an express provision for judicial review?

The City of Gainesville respectfully submits that:

1) Its content-neutral street / sidewalk closing ordinance does not facially violate First Amendment speech;

2) The Court of Appeals decision striking down the City's street / sidewalk permitting regulation as facially unconstitutional misreads and erroneously extends *Freedman v. Maryland* and directly conflicts with *FW/PBS, Inc. v. City of Dallas*; and

3) The panel's holding runs counter to the decisions of other circuit courts of appeal.

The petition for writ of certiorari should therefore be granted.

Respectfully submitted,

H. JACK KLINGENSMITH
Counsel of Record

WALTERS LEVINE BROWN
KLINGENSMITH & THOMISON, P.A.
1515 Ringling Boulevard,
Suite 900
Sarasota, FL 34236
(941) 364-8787

MARION J. RADSON, City Attorney
City of Gainesville
200 E. University Avenue,
Suite 425
Gainesville, FL 32602
(352) 334-5011

March 29, 2001

APPENDIX

TABLE OF CONTENTS

Page

Cannabis Action Network, Inc. v. City of Gainesville, 231 F.2d 761 (11th Cir. 2000).....App. 1

Order dated January 26, 1998, Federal District Court, Northern District of Florida .....App. 33

Order dated December 29, 2000, Eleventh Circuit Court of Appeals.....App. 54

City of Gainesville Charter Laws Article I. Establishment, Corporate Limits, and Powers.....App. 56

City of Gainesville Code Section 23-42. Congregating on streets and sidewalks.....App. 64

United States Court of Appeals,
Eleventh Circuit.

CANNABIS ACTION NETWORK, INC., Kevin Aplin,
Plaintiffs-Appellants-Cross-Appellees,
v.
CITY OF GAINESVILLE, Defendant-Appellee-Cross-Appellant.
Cannabis Action Network, Inc., Kevin Aplin, Plaintiffs-Appellees,
v.
City of Gainesville, Defendant-Appellant.

Nos. 99-2022, 99-2216.

Oct. 24, 2000.

Gary S. Edinger, Gainesville, FL, Richard L. Wilson, Orlando, FL, for Plaintiffs-Appellants-Cross-Appellees.

Elizabeth A. Waratuke, Marion J. Radson, City of Gainesville City Atty., Gainesville, FL, H. Jack Klingensmith, Elinor Elizabeth Baxter, Walters, Levine, Brown, Klingensmith & Milonas, Sarasota, FL, for City of Gainesville.

Appeals from the United States District Court for the Northern District of Florida.

Before EDMONDSON, DUBINA and WILSON, Circuit Judges.

DUBINA, Circuit Judge:

These consolidated appeals involve facial challenges to a Gainesville, Florida, street closing ordinance and a sound ordinance. Plaintiff Cannabis Action Network's ("CAN") appeal on the merits has been consolidated with

the Defendant City of Gainesville's (the "City") procedure-based appeal which argues that CAN's substantive appeal is untimely. We affirm the district court's judgment as to the procedural issue and reverse its determination of the merits.

BACKGROUND

CAN represents a group of self-described "political activists who seek to challenge the laws of the United States and the individual states prohibiting the possession and distribution of marijuana," based on the belief that "cannabis has a variety of medicinal, industrial, and food uses which should be brought to the attention of the public." CAN regularly conducts political rallies in public parks around the country to educate the public and protest the current state of the law. Since 1989, CAN has conducted an annual rally in the Downtown Plaza in Gainesville.

On October 11, 1995, CAN applied for three permits from the City which were necessary for the annual rally: (1) an Event Permit, (2) a Street Closing Permit, and (3) a Sound Amplification Permit. The city manager denied these applications on November 3, 1995.

Soon after, Marcellina Michel-Trapaga[1] and CAN (collectively "Plaintiffs") filed a complaint in federal district court seeking declaratory and injunctive relief.

---

[1] Ms. Michel-Trapanga has since settled her suit with the City and is not a party to these appeals. CAN and Kevin Aplin, who was added as a plaintiff after the filing of the original complaint, filed the present substantive appeal.

Plaintiffs alleged that Section 18-17 of the Gainesville Code, which authorizes the city manager to promulgate rules for the use of the City's parks, the Street Closing Permit Ordinance, which requires a permit in order to gather in the City's parks, and the Sound Amplification Permit Ordinance, which requires a permit for the use of sound amplification, violate their First Amendment rights. The Plaintiffs also claimed that the City's Special Events Policy, which had been promulgated pursuant to Section 18-17 violated their First Amendment rights. Plaintiffs amended their complaint on December 5, 1995, to add Kevin Aplin as a plaintiff. After a hearing on the preliminary injunction, the district court judge enjoined the City from enforcing its Special Event Policy finding a substantial likelihood that the policy violated the First Amendment.

The City then filed a motion for clarification to determine whether the preliminary injunction required the City to issue a Street Closing Permit and a Sound Permit along with the Event Permit. In response, the district court entered a supplemental order requiring the City to issue all three permits. As a result, CAN held its annual rally on December 9, 1995. Approximately one year later, Plaintiffs filed a second amended complaint seeking a declaratory judgment that the permit ordinances, the delegation of rule-making authority ordinance, and the Special Event Policy (as amended) were unconstitutional.

On April 24, 1997, CAN filed a motion for summary judgment asking the district court to declare the challenged ordinances and the Special Event Policy unconstitutional. In response, the City conceded that Section

23-42 of the Gainesville Code ("Street Closing Ordinance")[2] and the City's Special Event Policy, promulgated under Section 18-17, were unconstitutional, but disputed the remainder of the claims. On January 26, 1998, the district court granted CAN's motion in part, declaring the *original* version of the Street Closing Ordinance unconstitutional and reaffirming the preliminary injunction which held the Special Event Policy unconstitutional. The district court also ruled, in pertinent part, that the *amended* version of the Street Closing Ordinance was facially constitutional and that Section 15-4 of the Gainesville Code ("Sound Ordinance") was not susceptible to a facial challenge.[3]

On June 3, 1998, the district court entered a Final Judgment in favor of CAN and the various individual Plaintiffs on the facial unconstitutionality of the original version of the Street Closing Ordinance. However, the written judgment failed to mention that the district court had affirmed the enforceability of both the Sound Ordinance and the revised version of the Street Closing Ordinance. On June 10, 1998, the City filed a timely motion to amend the Final Judgment to accurately reflect the court's January 26, 1998, Partial Summary Judgment Order. On the same day, not realizing that the City had a motion pending relating to the judgment rendered against CAN,

---

[2] The City subsequently amended the Street Closing Ordinance, and Plaintiffs challenged the amended ordinance.

[3] The district court rejected Plaintiffs' challenge to Section 18-17, the delegation of rule-making authority to the city manager. This ordinance will not be discussed in this appeal because Plaintiffs abandoned their challenge to this ordinance.

CAN and Aplin filed their notices of appeal.[4] As a result of the City's pending motion, the district court dismissed CAN's appeal as untimely.

In response to the City's motion, CAN agreed that the Final Judgment should be amended and further argued that, although the individual Plaintiffs did not join the April 24, 1997, motion for summary judgment, the district court could grant a judgment in their favor, as to the Street Closing Ordinance and the Event Policy, because when a court finds an ordinance to be facially unconstitutional upon the challenge of any one party, the ordinance is necessarily unconstitutional as to all others. On September 9, 1998, the district court granted the City's motion to amend the judgment, but declined to grant summary judgment in favor of the individual Plaintiffs. Instead, the district court directed the City to show cause why it should not grant summary judgment in favor of the individual Plaintiffs. The clerk's office was delinquent in entering the amended judgment directed by the court's September 9 order.[5] Believing that the case was still active as to both CAN and the individual Plaintiffs, CAN failed to renew its notice of appeal after the September 9 order.

After reviewing the memoranda filed regarding the status of the individual Plaintiffs' claims, the district

---

[4] The City originally filed a cross appeal to CAN and Aplin's substantive appeal, but the City subsequently abandoned the cross appeal.

[5] As of at least December 10, 1998, the clerk's office had not entered the September 9 amended judgment. *See* Doc. 117 at 2.

court entered an order dated November 17, 1998, granting summary judgment in favor of the remaining defendants and ruling that the amended Street Closing Ordinance was constitutional. However, the order failed to address the constitutionality of the Sound Ordinance and the Event Policy that had also been challenged by the individual Plaintiffs. Because of this omission, the individual Plaintiffs moved for clarification of the order, which the district court ultimately granted, in conjunction with its finding that the individual Plaintiffs were entitled to summary judgment on the issues involving the Gainesville Ordinances § 18-17, § 15-14, and the amended version of § 23-42. *See* Doc. 217 at 6.

In October of 1998, CAN filed a motion to extend the time for filing a notice of appeal under Federal Rule of Appellate Procedure 4(a)(5) ("Rule 4(a)(5)"). Identifying the history of the proceedings as "convoluted," and finding that CAN's failure to file a timely notice of appeal was "excusable neglect," the district court granted the motion to extend time. Accordingly, CAN was permitted to file a notice of appeal out of time and to join Kevin Aplin's timely appeal, The City now appeals the district court's grant of an extension of time to CAN to file its notice of appeal. As previously noted, the City's procedure-based appeal has been consolidated with CAN and Kevin Aplin's appeal on the merits.[6]

---

[6] The proceedings from that point took a separate track with respect to the remaining Plaintiffs. On May 3, 1999, the City filed a motion to amend the judgment entered in favor of CAN which struck down the original version of the Street Closing Ordinance. The district court entered an order stating that it would be inclined to identify those issues on which CAN

There are three issues before us on appeal. As a preliminary matter, we must decide whether the district court abused its discretion in extending CAN's time to file a notice of appeal. If we find that CAN's appeal is properly before us, we must then determine whether Gainesville's Sound Ordinance (§ 15-4) and Street Closing Ordinance (§ 23-42) are unconstitutional prior restraints on free speech because they fail to include each procedural safeguard outlined in *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).[7]

---

failed to prevail if the case were remanded by this court for that purpose. Soon after, the City filed a motion for remand with this court. We granted that motion and remanded the case for the limited purpose of correcting "certain clerical errors in the final judgment." *See* Order 99-2022, Nov. 18, 1999.

[7] Although the permit ordinance discussed in *Coalition for the Abolition of Marijuana Prohibition (CAMP) v. City of Atlanta*, 219 F.3d 1301 (11th Cir.2000), is similar to the permit ordinances before us in this case, CAMP's challenge to the "time, place and manner" restrictions contained in the Atlanta ordinance is distinct from CAN's *Freedman*-based challenge to Gainesville's ordinances. In their original suit, the *CAMP* plaintiffs did bring a *Freedman*-based challenge to the Atlanta Outdoor Festival Ordinance 1994, Atlanta City Code § 138-208, and indeed, the district court held that the procedural safeguards contained therein were inadequate. *See id.* at 1308.

The City of Atlanta subsequently amended the procedural safeguards portion of the Festival Ordinance. The new version of Atlanta City Code § 138-207 provides that an applicant shall receive notice of a permit denial "no later than 30 days prior to the proposed date of the event." Sections 138-207 and 138-208 further provide for a *de novo* administrative appeal to the Mayor within 10 days of the denial. Finally, Section 138-208 provides that a denial by the Mayor:

shall be the final decision of the City in the matter, and shall be subject to review by the Superior Court of Fulton County by a

STANDARDS OF REVIEW

We review a district court's grant of an extension of time under Rule 4(a)(5) for abuse of discretion. *See Advanced Estimating System, Inc. v. Riney*, 130 F.3d 996, 997 (11th Cir.1997). We review grants of summary judgment de novo, applying the same legal standards as the district court. *See Cutcliffe v. Cochran*, 117 F.3d 1353, 1355 (11th Cir.1997).

DISCUSSION

A. Rule 4(a)(5)

The City appeals the district court's grant of an extension of time to CAN to file its notice of appeal. CAN concedes that its first notice of appeal was untimely. However, CAN argues that the district court's extension was proper under Rule 4(a)(5) which provides that a district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal. CAN argues that the district court properly granted the extension of time because of the substantial ambiguities in the post-judgment proceedings at the district level. The City counters that CAN's argument relies

---

petition setting forth an appeal and naming the City of Atlanta as the defending party. The City shall expedite its response to such petition so as to allow the provision of judicial determination of the matter no later than ten (10) days prior to the date of the festival. The *CAMP* plaintiffs did not renew their *Freedman*-based challenge with regard to the amended version of the ordinance. *See id.* Accordingly, this court never considered the constitutionality of the procedural safeguards contained in either the 1994 or the 2000 version of the Atlanta Festival Ordinance.

on a lack of awareness and on a misunderstanding of the law, both of which do not support a finding of excusable neglect.

The Committee Notes for Rule 4(a)(5) clarify that a motion for an extension of time which is filed before expiration of the original 30-day period is evaluated under the "good cause" standard, whereas a motion for an extension of time filed after the expiration of the original 30-day period is evaluated under the "excusable neglect" standard. *See* Fed. R.App. P. 4(a)(5) advisory committee's notes; *accord Advanced Estimating System, Inc.* 77 F.3d at 1323. Thus, in this case, because CAN filed its motion outside of the original 30-day period, we must apply the excusable neglect standard.

When applying the excusable neglect standard in the context of the Federal Rules of Appellate Procedure, this court adheres to the standard originally set forth in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). *See Advanced Estimating Sys.*, 77 F.3d at 1324. *Pioneer's* excusable neglect standard mandates that:

> courts should "tak[e] account of all relevant circumstances surrounding the party's omission," including "the danger of prejudice to the [nonmovant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith."

77 F.3d at 1325 (quoting *Pioneer*, 507 U.S. at 395, 113 S.Ct. at 1498).

An examination of the four *Pioneer* factors reveals that the district court in this case did not abuse its discretion. First, the City has not been prejudiced by CAN's tardiness because the City knew from CAN's premature filing of its notice of appeal that CAN intended to appeal. Furthermore, because Kevin Aplin's notice of appeal was timely, this court would hear the constitutional issues arising out of the case, and the City would be forced to defend the same even if CAN was not permitted to participate. Second, the effect on the judicial process resulting from CAN's tardiness in filing its notice of appeal is *de minimus*, particularly in light of the many years these parties have been involved in this litigation. *See City of Chanute v. Williams Natural Gas Co.*, 31 F.3d 1041, 1046-47 (10th Cir.1994) (noting that a 31-day delay was "a very short time" in the context of a "protracted litigation battle"). In fact, CAN's late notice has had no effect on this court's review of the merits of the case because this court must decide the same questions as presented in the timely appeal of CAN's co-Plaintiff, Kevin Aplin.

Third, CAN has a legitimate reason for its delay in filing its notice. As highlighted by the district court, the post-judgment history of this case has been confusing. Originally, CAN attempted to file its notice of appeal on June 3, 1998, but because the City filed a motion to amend, this initial notice was rendered premature, and therefore, ineffective. The district court's September 9, 1998, ruling on the City's motion to amend included language that required the City to "show cause . . . why summary judgment should not also be awarded against the remaining plaintiffs." *See* Doc. 205 at 3. Based on the district court's express reservation to consider additional

relief, CAN developed the good faith belief that the district court's September 9 order did not completely dispose of the pending Rule 59 motion. That belief was incorrect because the district court's order reserved judgment only with regard to the individual plaintiffs and did not affect the finality of the judgment against CAN.[8]

The district court found it "understandable that CAN thought that the court considered that question (whether the court should grant summary judgment to the individual plaintiffs) to be part and parcel of the motion to amend the judgment." *See* Doc. 217 at 6. The district court goes on to explain that CAN's erroneous view was also subscribed to by the clerk's office, which failed to enter the amended judgment against CAN, "probably also believing that the order of September 9, 1998, did not fully intend to dispose of the pending motion to amend."[9] *See* Doc. 217 at 6. Accordingly, CAN's tardiness results from circumstances which were beyond its reasonable control and not from mere lack of awareness or misunderstanding of the law. *See Advanced Estimating System,*

---

[8] CAN argues that its mistake did not become apparent until after its 30-day period for filing its notice of appeal had expired.

[9] The confusing nature of this case continued after the September 9 order. For example, when Summary Judgment was ultimately entered in favor of the individual Plaintiffs on November 17, 1998, the Order did not specify those issues on which the Plaintiffs failed to prevail. Accordingly, the post-judgment fog did not begin to clear until issuance of the December 8, 1998, order. Moreover, the confusion still persists on some fronts, illustrated by the fact that this court has had to remand the case to the district court to correct another technical error in the language. *See* Order, Filed Nov. 18, 1999.

Inc., 130 F.3d at 998. Finally, as noted by the district court, CAN has been diligent and unwavering in its attempt to pursue an appeal. There is no indication that CAN's delay resulted from mere negligence or bad faith.

Unlike *Advanced Estimating System*, this case concerns a mistake of fact, not law. CAN was mistaken as to whether the September 9 ruling was a final judgment. In context, the mistake is understandable. This is not a case where an attorney simply misunderstood the rules. To the contrary, the orders of the district court were unclear, making it difficult for CAN to apply the rules of procedure. After a careful analysis, the district court determined that CAN's attorneys had good reason to misconstrue the ambiguous situation. This court is not invited to reevaluate the district court's finding of excusable neglect. What matters is that the district court applied the correct law, and its conclusion does not constitute an abuse of discretion. Accordingly, we affirm the district court's grant of an extension of time for CAN to file its notice of appeal under Fed. R.App. P. 4(a)(5) and hold that we have jurisdiction over CAN's substantive appeal.

B. Substantive Appeal

This case involves First Amendment protected speech in "the archetype of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480, 108 S.Ct. 2495, 2500, 101 L.Ed.2d 420 (1988). The two challenged ordinances do not completely suppress all First Amendment activity, but they sharply confine the scope of the speech activity by effectively limiting the number of people who can listen

and participate. Accordingly, we must first determine, with respect to the Sound Ordinance, if the restriction on the use of amplified sound constitutes a prior restraint on speech. We need not determine if the Street Closing Ordinance is a prior restraint because both parties, as well as the district court, properly agree that it is. Second, we will examine both ordinances to determine if they contain the procedural safeguards required of prior restraints on speech.

1. Prior Restraint

The Supreme Court has held that any statute or ordinance which vests local officials with discretionary power to issue a permit that is required as a prerequisite to the use of public places for First Amendment activities is a prior restraint on speech. *See Kunz v. New York*, 340 U.S. 290, 293-94, 71 S.Ct. 312, 314-15, 95 L.Ed. 280 (1951). A prior restraint, unlike other restrictions on speech, is subject to a facial challenge. *See Ward v. Rock Against Racism*, 491 U.S. 781, 793, 109 S.Ct. 2746, 2755, 105 L.Ed.2d 661 (1989) ("Our cases permitting facial challenges to regulations that allegedly grant officials unconstrained authority to regulate speech have generally involved licensing schemes that 'vest[ ] unbridled discretion in a government official over whether to permit or deny expressive activity.' ") (quoting *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755, 108 S.Ct. 2138, 2143, 100 L.Ed.2d 771 (1988)). Facial challenges are permitted on the rationale that when a prior restraint allegedly contains a risk of delay or arbitrary censorship, "every application of the statute create[s] an impermissible risk of suppression of ideas." *United States v. Frandsen*, 212 F.3d

1231, 1236 (11th Cir.2000) (quoting *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 889 (6th Cir.2000)).

CAN brings a facial challenge to the constitutionality of Section 15-4 of the Gainesville Code, the Sound Ordinance. Section 15-4 vests the city manager with the discretion to exempt special events from the general prohibition on the use of amplified sound contained in Section 15-3.[10] The exception in Section 15-4, entitled "Special Permits" provides:

> Applications for a special permit for relief from the maximum sound level limits designated in this chapter . . . may be made in writing to the city manager or designee, or his/her duly authorized representative. Any permit granted by the city manager or designee hereunder must be in writing and shall contain all conditions upon which the permit shall be effective. The city manager or designee, or his/her duly authorized representative, is authorized to grant the relief as applied for under the following conditions:

---

[10] Section 15-3 provides:

(a) *General Prohibition.* It shall be unlawful and a violation of this chapter to make, cause or allow the making of any sound that exceeds the limits set forth in this chapter, causes a noise disturbance, or is plainly audible as defined in section 15-2 . . .

(3) *Radios, televisions, electronic audio equipment, musical instruments or similar devices.* No person shall operate, play, or permit the operation of any . . . sound amplifier that produces, reproduces or amplifies sound in such a manner as to create a noise disturbance or be plainly audible across a real property boundary. However this subsection shall not apply to any use or activity for which a special permit has been issued pursuant to section 15-4.

> (1) *Authority to prescribe special requirements.* The city manager or designee may prescribe any reasonable conditions or requirements he/she deems necessary to minimize noise disturbances upon the community or surrounding neighborhood, including use of mufflers, screen or other sound-attenuating devices.
>
> . . .
>
> (3) *Other Permits.* Special permits for nonentertainment special purposes, other than for emergency work . . . may be issued under the following conditions:
>
> . . .
>
> (c) The special permit may be issued only for hours between 7:00 a.m. and 11:00 p.m. the same day on week days, and
>
> (d) Special permits may be issued for no longer than one week. . . .

Gainesville Code § 15-4. The district court found that the Sound Ordinance was not subject to a facial challenge because "in their challenge to § 15-4, the plaintiffs do not suggest that city officials enjoy unfettered discretion to deny speech altogether, just that the city could refuse to allow amplification of sound."[11] The district court distinguished the Sound Ordinance from other kinds of restraints on the grounds that the Ordinance does not flatly deny the speaker the right to speak in public. Rather, the Sound Ordinance denies the speaker the right

---

[11] As a factual matter, it is without question that CAN's complaint alleges that the city manager has "complete and unfettered discretion" to grant or deny permits for political rallies.

to amplify his speech so that it may be heard by many others.

In support of its finding, the district court cites *Ward v. Rock Against Racism* for the proposition that a sound regulation whose goals are to "insure appropriate sound quality balanced with respect for nearby residential neighbors" is not a prior restraint on speech. *See* Doc. 146 at 18 (quoting *Ward*, 491 U.S. at 794, 109 S.Ct. at 2755). The district court's reliance on *Ward*, however, fails to recognize a fundamental difference between this case and *Ward;* the *Ward* Court never confronted an outright denial of sound amplification. To the contrary, *Ward* turned on the issue of who had the right to control the mix and level of the amplified sound.[12] *See* 491 U.S. at 792, 109 S.Ct. at 2754. Moreover, despite offering dicta which questioned the propriety of a facial challenge to a sound amplification ordinance, the *Ward* Court ultimately decided the case on the merits of the facial challenge. *See id.* at 794, 109 S.Ct. at 2755 ("We need not decide, however, whether the 'extraordinary doctrine' that permits facial challenges to some regulations of expression should be extended to the circumstances of this case, for respondent's facial challenge fails on its merits.") (internal citation omitted).

---

[12] Rock Against Racism objected to the city's control over the mix and level of sound because, in its view, "the city [was] seeking to assert *artistic control* over performers at the bandshell by enforcing a bureaucratically determined, value-laden concept of good sound." 491 U.S. at 792, 109 S.Ct. at 2754 (emphasis added). Thus, Rock Against Racism's argument turned on the notion that the sound was an integral part of the content, reasoning that control over sound equals control over content. The Supreme Court rejected that rationale.

Thus, the Supreme Court did not determine that a facial challenge was inappropriate. Instead, the Court held that vesting the right to control sound amplification in the hands of the government did not amount to a prior restraint on speech. *See id.*

This case is distinct from *Ward* because it involves not merely the right to limit and control noise level and mix of sound, but the ability of the government, here the City of Gainesville, to deny the use of sound amplification equipment *in toto:*

> The grant of discretion that respondent seeks to challenge here is of an entirely different, and lesser, order of magnitude [than other facial challenge cases], because respondent does not suggest that city officials enjoy unfettered discretion to deny bandshell permits altogether. Rather, respondent contends only that the city, by exercising what is concededly its right to regulate amplified sound, could choose to provide inadequate sound for performers based on the content of their speech. Since respondent does not claim that city officials enjoy unguided discretion to deny the right to speak altogether, it is open to question whether respondent's claim falls within the narrow class of permissible facial challenges to allegedly unconstrained grants of regulatory authority.

Id. at 793-94, 109 S.Ct. at 2755. In the present case, CAN does, in fact, claim that city officials enjoy unbridled discretion to deny use of *all* amplification equipment and that this discretion can effectively ban speech itself. In this sense, Gainesville's ordinance appears to "authorize [ ] suppression of speech in

advance of its expression," through a general ban on the use of sound amplification equipment unless a special permit is obtained. *Id.* at 795 n. 5, 109 S.Ct. at 2756 n. 5 ("The relevant question [in determining the presence of a prior restraint] is whether the challenged regulation authorizes the suppression of speech in advance of its expression . . . ").

Though decided long before *Ward* and even before *Freedman*, the Supreme Court's opinion in *Saia v. New York*, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948), is closely analogous to this case.[13] The ordinance in *Saia* forbade the use of all sound amplification devices except with the permission of the Chief of Police.[14] *See* 334 U.S.

---

[13] Though not mentioned in *Ward*, *Saia* has been regularly cited with approval, most recently in *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 226, 110 S.Ct. 596, 605, 107 L.Ed.2d 603 (1990).

[14] The ordinance provided in pertinent part: Section 2. Radio devices, etc. – It shall be unlawful for any person to maintain and operate in any building, or on any premises or on any automobile, motor truck or other motor vehicle, any radio device, mechanical device, or loud speaker or any device of any kind whereby the sound therefrom is cast directly upon the streets and public places and where such device is maintained for advertising purposes or for the purpose of attracting the attention of the passing public, or which is so placed and operated that the sounds coming therefrom can be heard to the annoyance or inconvenience of travelers upon any street or public places or of persons in neighboring premises.

Section 3. Exception. – Public dissemination, through radio, loudspeakers, of items of news and matters of public concern and athletic activities shall not be deemed a violation of this section provided that the same be done under permission obtained from the Chief of Police.

334 U.S. at 558 n.1, 68 S.Ct. at 1149.

at 558, 68 S.Ct. at 1149. The challenge to the statute came from a Jehovah's Witness, Saia, who obtained permission from the Chief of Police to use sound equipment, mounted atop his car, to amplify lectures on religious subjects given in a public park on Sundays. *See id.* at 559, 68 S.Ct. at 1149. Upon expiration of his first permit, the Chief of Police denied Saia a second permit. *See id.* Saia appealed and the Supreme Court held:

> [Section] 3 of this ordinance is unconstitutional on its face, for it establishes a previous restraint on the right of free speech in violation of the First Amendment which is protected by the Fourteenth Amendment against State action. To use a loud-speaker or amplifier one has to get a permit from the Chief of Police. There are no standards prescribed for the exercise of his discretion. The statute is not narrowly drawn to regulate the hours or places of use of loud-speakers, or the volume of sound (the decibels) to which they must be adjusted.

334 U.S. at 559-60, 68 S.Ct. at 1149. The Supreme Court likened the sound ordinance to other ordinances previously struck down as prior restraints on speech, such as a license requirement to distribute religious material, a license requirement to distribute literature, and a license requirement for public assembly in public parks or in the streets because all four had the same defect – the right to be heard is placed in the uncontrolled discretion of the Chief of Police. *See id.* (citing *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940); *Lovell v. Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938); and *Hague v. C.I.O.*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939)).

The *Saia* Court stated emphatically that "[l]oudspeakers are today indispensable instruments of effective public speech." 334 U.S. at 561, 68 S.Ct. at 1150. Treating a licensing requirement for the use of sound amplification as a prior restraint, the Court held that noise can be regulated through narrowly drawn statutes which limit decibel levels and/or the hours and place of public discussion, but insisted that "[w]hen a city allows an official to ban [loud speakers] in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas." *Id.* at 562, 68 S.Ct. at 1150-51. Moreover, the Court expressly rejected nuisance or annoyance as a justification for restricting free speech through a denial of sound amplification. *See id.* at 561-62, 68 S.Ct. at 1150-51. Accordingly, we conclude that the district court erred in this case when it found that the Sound Ordinance is not subject to facial challenge. The Sound Ordinance is a prior restraint on speech and as such, must meet the procedural safeguards set forth in the *Freedman* line of cases. *See FW/PBS*, 493 U.S. at 225-26, 110 S.Ct. at 605; *Freedman*, 380 U.S. at 58-59, 85 S.Ct. at 739.

2. Procedural Safeguards

In *Freedman v. Maryland*, the Supreme Court enumerated certain constitutional concerns and the corresponding procedural safeguards necessary to ensure the protection of the First Amendment speech rights when faced with a system of prior restraints. Cases dealing with prior restraints have identified two evils which must be guarded against. *See, FW/PBS*, 493 U.S. at 225-26, 110 S.Ct. at 604-05; 380 U.S. at 57-58, 85 S.Ct. at 738. First, a scheme that places unbridled discretion in the hands of a

government official or agency threatens unconstitutional censorship. *See FW/PBS*, 493 U.S. at 225-26, 110 S.Ct. at 604-05. Second, a prior restraint that fails to place limits on the time within which the decision-maker must issue the license creates the possibility that constitutionally protected speech will be suppressed. *See id.* at 226, 110 S.Ct. at 605. *Freedman* sets forth three procedural safeguards: (1) upon denial of the right to speak, the censor must bear the burden of initiating judicial proceedings, as well as the burden of proof once in court; (2) any restraint prior to judicial review can be imposed only for a specified and brief time period during which the status quo is maintained; and (3) there must be the assurance of prompt judicial review in the event that the speech is erroneously denied. 380 U.S. at 58-59, 85 S.Ct. at 739. In *FW/PBS*, a majority of the Court agreed that, at the very least, the latter two of these safeguards are "essential," while a three judge plurality held that the first procedural safeguard may not be required in certain limited circumstances. *See* 493 U.S. at 229-30, 110 S.Ct. at 606-07; *see also, Ward v. County of Orange*, 217 F.3d 1350 (11th Cir.2000) ("[T]he [FW/PBS] plurality concluded a [business] licensing scheme must provide the second and third safeguards required by *Freedman*."); *Redner v. Dean*, 29 F.3d 1495, 1500 (11th Cir.1994) ("In *FW/PBS*, therefore, six Justices agreed that a [business] licensing ordinance, such as the one in question here, must contain, at a minimum, the latter two procedural safeguards from *Freedman:* specified brief time limits on the decisionmaker and prompt judicial review."). Having determined that both the Sound Ordinance and the Street Closing Ordinance are prior restraints on speech, we must evaluate each ordinance for

the presence of at least two, if not all three, of the *Freedman* procedural safeguards.

a. Sound Ordinance

Examining the Sound Ordinance for compliance with *Freedman*'s procedural safeguards, we need not look closely at whether the ordinance meets the first and third safeguards, because the ordinance plainly fails to meet the requirements of the second safeguard. The second *Freedman* requirement "that any restraint prior to a judicial determination may only be for a specified brief period of time in order to preserve the status quo means that 'the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained.' " *Frandsen*, 212 F.3d at 1239 (quoting *FW/PBS*, 493 U.S. at 228, 110 S.Ct. at 606). Even a cursory examination of the City's Sound Ordinance reveals that it does not specify any time within which the city manager must issue or deny a Sound Amplification Permit. Furthermore, the ordinance does not obligate the city manager to make a decision at all, nor does it require the manager to notify the applicant of the decision. Thus, as was the case in *FW/PBS*, the ordinance leaves open the possibility of "indefinite postponement of the issuance of a license." 493 U.S. at 227, 110 S.Ct. at 606. Lacking this essential procedural safeguard, the Sound Ordinance cannot withstand a facial challenge. Accordingly, the district court's grant of

summary judgment in favor of the City as to the Sound Ordinance must be reversed.[15]

b. Street Closing Ordinance

Unlike the Sound Ordinance, examination of the Street Closing Ordinance requires us to evaluate the two "essential" procedural safeguards and to determine whether the remaining procedural safeguard should be required in this instance. Although the City has amended the Street Closing Ordinance since CAN first brought this challenge,[16] CAN insists that the new ordinance still

---

[15] We note additionally that the Sound Ordinance does not set forth any standards to govern the basis upon which the city manager should issue or deny a permit. The manager is authorized, but not required, to issue sound amplification permits. There are no guidelines or standards to limit his decision-making discretion. The ordinance says only that the goal of the manager's decision is "to minimize noise disturbances upon the community or surrounding neighborhood." In this sense, the ordinance approaches a censorship scheme, as it appears to provide the city manager with unbridled discretion to issue or deny a permit.

[16] At the outset of this case, the City conceded that the original version of the Street Closing Ordinance, Section 23-42, was subject to a facial challenge and that it was unconstitutional in its original form. The City has since amended the ordinance, and in doing so, corrected some of the original constitutional infirmities. For example, the new ordinance requires final action by the city manager within five days of submission of an application and under appropriate circumstances, that time may be shortened to two days. Accordingly, CAN no longer asserts a challenge to the time-limit aspect of the ordinance.

stops short of meeting the first and third *Freedman* procedural safeguards.[17] CAN concedes that Section 23-42 satisfies the second procedural safeguard listed in *Freedman* and identified as "essential" in *FW/PBS*, because the ordinance requires a decision by the city manager within a brief, specified period of time.

---

[17] Currently, § 23-42 provides in pertinent part:

(a) *Permit Required.* It shall be unlawful for persons to assemble or congregate in crowds in such numbers as to block the use of any sidewalk or street of the city without a permit from the city manager or designee, issued pursuant to this section

. . .

(c) *Granting or denial of permit.*

(1) *Granting of permit; time; considerations.* The city manager or designee shall grant the requested permit within five business days of receipt of the application . . . if the event or activity for which it is requested: a. Will not unreasonably interfere with the flow of vehicular or pedestrian traffic, such as when alternative routes for such traffic are unavailable or impractical;

b. Will not unreasonably deny access to any properties or areas of the city by either vehicular or pedestrian traffic;

c. Will not cause imminent danger or health hazard to any person and will not damage any public or private property; and

d. Will not create an unreasonable demand upon the city's emergency services personnel and equipment, so as to cause potential deficiencies in such services.

. . .

(2) If the city manager or designee finds the planned event or activity violates any of the above conditions, he or she shall inform the applicant that the permit will not be granted and request the city attorney apply to the circuit court for Alachua County for an order enjoining the applicant and other interested persons from conducting the planned event or activity.

Gainesville Code Sec. 23-42.

The other "essential" procedural safeguard identified by the *FW/PBS* plurality is the guarantee of "prompt judicial review." *See FW/PBS*, 493 U.S. at 228, 110 S.Ct. at 606. The Supreme Court has not explained exactly what it meant by "prompt judicial determination" in *Freedman*, nor what it meant by "prompt judicial review" in *FW/PBS*.[18] Consequently, there is great confusion and disagreement among the federal Courts of Appeal regarding what exactly *Freedman* and its progeny require to fulfill *Freedman's* third procedural safeguard.[19] This circuit

---

[18] The Supreme Court has indicated that a prior restraint, if it is to meet *Freedman's* requirements, must provide specifically for judicial review of administrative decisions to limit speech. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 561-62, 95 S.Ct. 1239, 1248, 43 L.Ed.2d 448 (1975). The scheme held to be inadequate judicial review in *Southeastern* consisted of non-statutory judicial access to the courts when a constitutional violation has been alleged. In *Southeastern*, the city rejected an application to use its auditorium. *See id.* at 561, 95 S.Ct. at 1248. Within a few days of the denial, a federal district court held hearings on a motion for preliminary injunction. *See id.* At that time, the court denied the preliminary injunction but, five months later, conducted a full hearing on the merits of the action for injunction. *See id.* Nevertheless, the Supreme Court held that the procedural safeguards were lacking because "[t]he board's system did not provide a procedure for prompt judicial review." *Id.* Some courts have considered the holding in *Southeastern* to be a requirement that the statute, regulation or ordinance explicitly provide for prompt judicial review of the decision to suppress expressive activity. *See Redner*, 29 F.3d at 1502 n. 9. Yet, other courts have since distinguished *Southeastern* on its facts to hold that non-statutory judicial access, usually access through a state's common law writ of certiorari, is sufficient. *See id.*

[19] Much of the confusion flows from the Supreme Court's plurality opinion in *FW/PBS, Inc.*, 493 U.S. 215, 110 S.Ct. 596:

officially weighed-in on a portion of the circuit split when we determined that *Freedman* and its progeny require only prompt judicial *access* where the ordinance was a business licensing scheme. *See Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1256-57 (11th Cir.1999). Importantly, we limited ourselves in *Boss Capital* to the specific facts before us and declined to answer the unposed question of whether *Freedman's* requirement of "prompt judicial review" demanded explicit provision for prompt judicial determination in challenges not involving business licensing schemes. *See id.* at 1256-57. For the reasons explained below, we need not answer that difficult question today.

As to *Freedman's* remaining procedural safeguard, CAN argues that the Street Closing Ordinance fails to require the City to initiate judicial proceedings. The City counters, arguing that *FW/PBS* provides for an exception to the *Freedman* requirement that the censor bear the burden of going to court and the burden of proof once in court. The *FW/PBS* plurality created a specific exception

---

Justice O'Connor's plurality opinion in that case says that "there must be the possibility of prompt judicial review in the event that [a] license is erroneously denied." *See id.* at 228, 110 S.Ct. 596. Later she says that the Dallas ordinance violates the First Amendment because "[i]t also fails to provide an avenue for prompt judicial review . . . " *Id.* at 228, 110 S.Ct. 596. In concurrence, Justice Brennan does not explicitly disagree with the plurality opinion on this issue, but he characterizes the right to prompt judicial review differently, referring to it as the right to "a prompt judicial determination." *Id.* at 239, 110 S.Ct. 596 (Brennan, J. concurring) (citing *Freedman*, 380 U.S. at 58-59, 85 S.Ct. 734).

Boss Capital, 187 F.3d 1251, 1255 (11th Cir.1999) (citations amended or omitted).

to this procedural safeguard for business licensing schemes. *See* 493 U.S. at 229-30, 110 S.Ct. at 606-07. This exception derives from two rationales. First, under a licensing scheme, the licensor merely "reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid," and does not "exercise discretion by passing judgment on the content of any protected speech." *Id.* at 229, 110 S.Ct. at 607. Second, a licensing scheme creates different financial incentives and puts "much more at stake" for the applicant than a censorship scheme: "Because the license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court." *Id.* at 229-30, 110 S.Ct. at 607. Relying on both of these differences, the *FW/PBS* plurality shifted the burden of going to court, as well as the burden of proof once in court, to the petitioner where the regulatory scheme is a business licensing scheme. *See id.; see also Ward v. County of Orange*, 217 F.3d at 1354 ("Once again, it is important to stress the differences between censorship schemes, and [business] licensing schemes – [t]he dangers of censorship are less threatening when it comes to [business] licensing schemes.") (quoting *Boss Capital*, 187 F.3d at 1256).

Careful analysis reveals that the regulation in this case displays aspects of both a censorship scheme and a licensing scheme as defined by the Supreme Court, and as a result, the regulation does not fall neatly into either category. Like the schemes in *FW/PBS* and *Boss Capital*, the City's permit scheme is content neutral. However, up to this point, all of the licensing scheme cases, including *FW/PBS*, *Boss Capital*, and *Ward v. County of Orange*,

involved business licenses. In contrast, this case involves a non-profit, public interest group seeking a one-time permit to engage in non-profit, political activities, rather than a commercial enterprise seeking a license to engage in for-profit, continuous commercial activities. Accordingly, this case lacks the second distinguishing characteristic of a business licensing scheme – CAN has no financial incentive to challenge the City's denial of a Street Closing Permit. In this sense, the permit sought by CAN is sharply distinct from the business licenses examined in *FW/PBS*, *Boss Capital* and *Ward v. County of Orange*.[20]

Finding that this case does not fall into either of the categories heretofore delineated by the Supreme Court,

---

[20] We recognize that it would be splitting hairs to try to base our distinction between the statutes on the use of the word "license" versus the use of the word "permit," as those words are often used interchangeably. *See e.g., Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 130-31, 112 S.Ct. 2395, 2401, 120 L.Ed.2d 101 (1992) (describing a challenge to a "permit fee" and applying the law that the "licensing authority" must be guided by "narrow, objective, and definite standards"); *Shuttlesworth*, 394 U.S. at 151, 89 S.Ct. at 935 ("an ordinance which, like this one, makes the peaceful enjoyment of freedoms . . . contingent upon the uncontrolled will of an official – as by requiring a *permit* or *license* which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms") (quoting *Staub v. City of Baxley*, 355 U.S. 313, 322, 78 S.Ct. 277, 282, 2 L.Ed.2d 302 (1958)) (emphasis added). Thus, our distinction, in this instance, rests not on the semantics of a given statute, but on the inherent differences between the facts of this case and cases involving business licensing statutes such as those in *FW/PBS* and *Boss Capital*.

we return to the original language in *Freedman* and in the Supreme Court's subsequent opinions to better understand the rationale behind this burden-shifting procedural safeguard. The *Freedman* court expressed its concern that without all three procedural safeguards:

> it may prove too burdensome to seek review of the censor's determination. Particularly in the case of motion pictures, it may take very little to deter exhibition in a given locality. The exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation.

380 U.S. at 59, 85 S.Ct. at 739. In *FW/PBS*, although distinguishing *Freedman*, the Court again recognized that absent a requirement that the censor bear the burden of going into court and the burden of proof, the party seeking to speak was "likely to be deterred from challenging the decision to suppress the speech, and therefore, the censor's decision to suppress was tantamount to complete suppression of the speech." 493 U.S. at 229, 110 S.Ct. at 607.

The power of deterrence identified in those two cases is even greater in this case, where the permit being sought is not a business license. To the contrary, the permit here is basically a parade permit; it is a permit which the speakers must obtain before they can make use of a quintessential public forum to engage in core political speech. *See R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 422, 112 S.Ct. 2538, 2564, 120 L.Ed.2d 305 (1992) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected

position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all.") (Stevens, White and Blackmun, JJ. concurring); *Burson v. Freeman*, 504 U.S. 191, 196, 112 S.Ct. 1846, 1850, 119 L.Ed.2d 5 (1992) ("[Q]uintessential public forums . . . include those places 'which by long tradition or by government fiat have been devoted to assembly and debate,' such as parks, streets, and sidewalks.") (quoting *Perry Education Assn. v. Perry Local Educators Assn.*, 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983)). Because the Street Closing Permit is not a business permit, most speakers in CAN's position lack financial incentive to challenge the City's Street Closing Ordinance and are likely to be heavily deterred from initiating litigation.

Moreover, the argument for relaxing the procedural safeguards is not as strong in this case as it was in *FW/PBS*. As we recognized in *Boss Capital*, the pre-*FW/PBS* cases predominantly involved censorship,[21] and *FW/PBS*

---

[21] *Freedman*, and many of the Supreme Court decisions it spawned, concerned censorship of sexually explicit material. *See Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 311, 100 S.Ct. 1156, 1158, 63 L.Ed.2d 413 (1980) (concerning obscene films); *McKinney v. Alabama*, 424 U.S. 669, 674, 96 S.Ct. 1189, 1193, 47 L.Ed.2d 387 (1976) (considering state censorship authority); *Southeastern Promotions*, 420 U.S. 546, 550-552, 95 S.Ct. 1239, 1242-43, 43 L.Ed.2d 448 (concerning production of a musical in a municipal theater in violation of nudity and obscenity ordinances); *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 365-66, 91 S.Ct. 1400, 1402-03, 28 L.Ed.2d 822 (1971) (concerning the seizure of 37 photographs deemed to be "obscene" by customs agents); *Blount v. Rizzi*, 400 U.S. 410, 412, 91 S.Ct. 423, 426, 27 L.Ed.2d 498 (1971)

was the first case to confront a licensing ordinance for adult entertainment establishments. *See* 187 F.3d at 1256. In *FW/PBS*, only a plurality of the Court was willing to relax *Freedman's* third procedural safeguard in the less protected context of a sexually oriented licensing scheme. *See* 493 U.S. at 228, 110 S.Ct. at 606. In the case before us, the censored party lacks the business incentive to pursue review through the courts, and the speech at issue is core political speech in a public forum. Thus, once again, "[w]e believe this is a situation for 'treating unlike things differently according to their differences.' " *Boss Capital*, 187 F.3d at 1256 (quoting *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1342 (11th Cir.1999)). The right to speak sought by CAN in this instance deserves greater protection than that outlined by the plurality in *FW/PBS*. Accordingly, we decline to relieve the City of the requirement that its Street Closing Ordinance meet *Freedman's* first procedural safeguard.

The City's Street Closing Ordinance provides that if the city manager or designee denies the applicant a Street Closing Permit he shall *request* the city attorney to initiate an enforcement action in the county's circuit court. *See* Gainesville Ord. § 23-42(c)(2). This provision, while it implies placement of the burden upon the City to initiate judicial proceedings, in effect, leaves the question of access to the unfettered discretion of the city attorney.

(questioning the constitutionality of a statute which halted the use of the mails and of postal money orders for commerce in allegedly obscene materials); *Freedman*, 380 U.S. at 52 n. 2, 85 S.Ct. 734, 736, 13 L.Ed.2d 649 (considering the constitutionality of a statute directed at films which are "obscene," or which tend to "debase or corrupt morals or to incite crimes.").

The shift of discretion from the city manager, who made the decision, over to the city attorney makes little difference – the provision still lacks a guarantee that the City will satisfy its burden of initiating judicial proceedings. As a result, the City's Street Closing Ordinance fails to fulfill the first procedural safeguard enumerated in *Freedman v. Maryland*. Without this safeguard, the Street Closing Ordinance is an unconstitutional prior restraint on speech. Accordingly, we must reverse the district court's grant of summary judgment in favor of the City as to the Street Closing Ordinance.

CONCLUSION

We hold that the district court did not abuse its discretion in granting CAN leave to file its notice of appeal out of time under Federal Rule of Appellate Procedure 4(a)(5). As to the substantive appeal, we reverse the district court's finding that the Sound Ordinance is not subject to facial challenge and hold that the Sound Ordinance is subject to a facial challenge. Lacking *Freedman*'s second procedural safeguard, we hold the Sound Ordinance constitutes an unconstitutional prior restraint on speech. Finally, we reverse the district court's finding that the Street Closing Ordinance fulfills each of *Freedman*'s procedural safeguards on the basis that it fails to ensure that the City will bear its burden of initiating litigation upon the denial of a Street Closing Permit.

AFFIRMED in part, REVERSED in part.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

MARCELINA MICHEL-TRAPAGA and CANNABIS ACTION NETWORK, INC., a non-profit Louisiana corporation,

Plaintiffs,

v.

CITY OF GAINESVILLE, a Florida municipal corporation,

Defendant.

_____/

CASE NO.
GCA 95-10172-MMP

ORDER

(Filed Jan. 26, 1998)

A hearing was held on August 11, 1997, on all pending motions in this case. Presently pending or pending in part are the following motions:

- Defendant's motion to dismiss the second amended complaint and motion for a more definite statement (doc. 63)
- Plaintiff's motion for partial summary judgment (doc. 85)
- Defendant's motion for summary judgment on count III of the second amended complaint (doc. 103).
- Plaintiff's motion to permit voluntary dismissal of counts III and IV (doc. 111).

- Plaintiff's motion for entry of final judgment (doc. 122).

I. BACKGROUND

Plaintiffs, Cannabis Action Network, Inc. ("CAN"), Kevin Aplin, Tom Miller, Robert Kundert, John Willcutts and Joe Tacl applied for permits to hold a rally (called "Hempfest 1995") in the Downtown Plaza on December 9, 1995. The city denied all of the permit applications, under Special Event Policies approved and issued by the City Manager only shortly after the permit application was filed.

The Special Event Policies stated, in relevant part:

> **E. Denial of Permit**. A permit may be denied only under the following circumstances:
>
> 5. ***The event has a history of resulting in illegal activity at or during the event due to the intentional conduct of event organizers or sponsors***. In determining that the current application is for the same event as one which resulted in such illegal activity, the following criteria shall be considered:
>
> **a.** The sponsors or organizers are the same or are shown to be closely affiliated.
>
> **b.** The name of the event is the same, or the advertising for the event indicates it is the same event (e.g., "second annual").
>
> **c.** The planned activities are the same as the ones that resulted in illegal acts at the prior event.
>
> **d.** The organizers/sponsors cannot give adequate assurance that the planned event

> will be materially different from the previous event, and that the illegal activity will therefore not reoccur at or during the event.

City of Gainesville's Event Policy (doc. 1, Exhibit B) at 2-3 (emphasis added). The Court notes that the "history of illegal activity" provision did not appear in the Event Policy until the policy was amended by the City Manager on November 2, 1995.

After their applications for permits and their requests for reconsideration were denied, the plaintiffs won a preliminary injunction from Judge William Stafford. In his order, the judge found that the event policies were unconstitutional because 1) they failed to provide a right to appeal the city manager's final decision; 2) they placed the burden of seeking judicial review on the applicant rather than the City of Gainesville; 3) they failed to provide assurances that any restraint on speech would be short-lived; and 4) as a substantive matter, a local government may not impose a prior restraint on public speech just because the speaker or others who heard the speaker previously engaged in illegal conduct. As the Court wrote in the order granting a preliminary injunction, "[j]ust as it would be constitutionally impermissible to allow local governments to base their decisions to deny event permits on their own subjective anticipation of what a person will say at a planned public event, so, too, would it be constitutionally objectionable to allow local governments to justify permit denials on their own judgment of what persons may or may not do at that event." *Order of December 9, 1995*, at 9-10 (doc. 21).

Along with attacking the events policies discussed above, Plaintiffs challenge three sections of the City

Code. First, Plaintiffs attack § 18-17. This section sets out the city manager's authority to regulate the use of public places in the city and provides:

> The city manager is authorized to promulgate rules and regulations for the purpose of regulating the use of public buildings, parks and playgrounds, limiting the hours during which the same shall be open to the public, establishing fees as may be requisite therefor, and providing standards of conduct for persons while using such buildings, parks and playgrounds.

Plaintiffs claim that this section is unconstitutional because "it provides no standards whatsoever to govern the City Manager's discretion when dealing with permits for use of public fora. Thus, the City Manager can arbitrarily grant, withhold or deny approval for public rallies like Hempfest at his sole discretion." *Plaintiffs' Statement of the Case*, attached to Joint Pretrial Stipulation (doc. 112, Exhibit 1).

The plaintiffs also attacked the former version of § 23-42, which made it illegal to "assemble or congregate in crowds upon the sidewalks and thoroughfares of the city without a permit from the city manager or designee, issued pursuant to this section." (version of § 23-42 in effect at the time of the permit applications). Specifically, the plaintiffs challenged the section's lack of effective judicial review, the lack of a burden on the City to seek judicial review before imposing a prior restraint on speech, the lack of assurances that any restraint would last only a short time, and the lack of limits placed on the city manager's discretion to impose conditions on the

granting of a permit. The plaintiffs also attacked subsection (c)(5), which stated:

> The city manager of his/her designee shall grant the requested permit if the event or activity for which it is requested;
>
> . . . .
>
> (5) is not designed and is not reasonably likely to imminently cause or occasion violence, criminal activity, or civil disorder.

The City, however, has since amended this section, removing paragraph (5) and adding language concerning judicial review.

First, the city added the following paragraph:

> If the city manager or designee finds the planned event or activity violates any of the above conditions, he or she shall inform the applicant that the permit will not be granted and request the City Attorney apply to the circuit court for Alachua County for an order enjoining the applicant and other interested persons from conducting the planned event or activity.

Ordinance No. 970130 0-97-45, amending § 23-42, p.3, lines 8-12 (creating a new subsection 23-42(c)(3)). The City also amended the provision of section 23-42 which stated: "the city manager or his/her designee may attach conditions to the validity of the permit if such conditions are, in his/her opinion, reasonably necessary for the event or activity to meet the criteria specified in the preceding subsection (c)." The section then listed several conditions, such as posting of bond for damages or changing the date, time or location of the event. The section stated, however,

that the conditions imposed were not limited to those listed.

In the amended version, the following right to judicial review is included:

> The applicant may petition the circuit court of Alachua County for review of the conditions placed on the permit. The court shall hear the appeal de novo without a jury, receive evidence and based upon the evidence presented shall make findings and order that the permit be granted either upon the terms requested or conditions stated by the court, or enjoin the holding of the event or activity if there is a reasonable likelihood that it will substantially harm the public health or safety and this cannot be avoided by the imposition of conditions on the permit.

Ordinance No. 970130 0-97-45, amending § 23-42, p.3, lines 5-10.

Finally, plaintiffs challenge § 15-4, which sets out the procedures for obtaining a permit for relief from the maximum sound level provisions of the other parts of chapter 15. Plaintiffs claim that this is a prior restraint of speech and that the provision lacks the procedural safeguards required under Supreme Court precedent. The defendants claim that it is merely a content-neutral time, place, manner restriction that does not regulate speech at all.

II. DISCUSSION

The plaintiffs seek a declaration that § 18-17, the former version of § 23-42, and § 15-4 are unconstitutional.

They also ask this court to analyze whether the new section 23-42 is facially unconstitutional. For the reasons given below, the Court concludes that although the former version of §23-42 was facially unconstitutional, § 18-17 and the current version of § 23-42 are not facially unconstitutional. Moreover, § 15-4 is not susceptible to a facial challenge.

A. Section 18-17

As an initial matter, plaintiffs' claim regarding § 18-17 can be easily disposed of. Section 18-17 authorizes the city manager to promulgate rules and regulations regarding the use of public areas of the city. It does not actually contain the rules and regulations themselves. The court concludes that this section is merely a general grant of authority to the city manager. As such, section 18-17 does not on its face control or regulate the use of public places, but merely gives the city manager authority to promulgate specific rules and regulations doing so. Because of this, the court declines to impose a requirement that this provision, and by implication every similarly general provision in the City Code, include a specific reference to the constitutional duty of the city manager. Such a duty is always implicit when the city manager or city government promulgates rules and regulations, and any specific regulation or rule promulgated pursuant to § 18-17 is itself subject to constitutional scrutiny. Accordingly, the motion for summary judgment and request for permanent injunction regarding § 18-17 are DENIED.

B. The former and current versions of section 23-42

The heart of this case concerns the constitutionality of section 23-42. The plaintiffs mount a facial challenge to both the former and current ordinance. It is well established that in the area of freedom of expression an overbroad regulation may be subject to facial review and invalidation, even if the party before the court would not otherwise have standing. *See, e.g., City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798-799, and n.15, 104 S.Ct. 2118, 2125, and n.15, 80 L.Ed.2d 772 (1984); *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574, 107 S.Ct. 2568, 2572, 96 L.Ed.2d 500 (1987). This exception from general standing rules is based on an appreciation that the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court. *See, e.g., New York v. Ferber*, 458 U.S. 747, 772, 102 S.Ct. 3348, 3362, 73 L.Ed.2d 1113 (1982); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503, 105 S.Ct. 2794, 2801, 86 L.Ed.2d 394 (1985). Thus, the Court has permitted a party to challenge an ordinance under the overbreadth doctrine in cases where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker, *see Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 741, 84 L.Ed. 1093 (1940); *Freedman v. Maryland*, 380 U.S. 51, 56, 85 S.Ct. 734, 737, 13 L.Ed.2d 649 (1965); *Taxpayers for Vincent*, 466 U.S., at 798 n.15, 104 S.Ct., at 2125, n.15, and in cases where the ordinance sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected, see

Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); *Jews for Jesus*, 482 U.S., at 574-575, 107 S.Ct., at 2572. This case involves allegations that the regulation is the first type, one that delegates overly broad discretion to the decisionmaker. A facial challenge is justified in this case.

The parties have stipulated that the forum involved in this case is "the archetype of a traditional public forum," *Frisby v. Schultz*, 487 U.S. 474, 480, 108 S.Ct. 2495, 2500, 101 L.Ed.2d 420 (1988). Thus, the Gainesville ordinance requiring a permit before authorizing public speaking, parades, or assemblies in fora including the one in this case, is a prior restraint on speech, *see Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151, 89 S.Ct. 935, 938-939, 22 L.Ed.2d 162 (1969); *Niemotko v. Maryland*, 340 U.S. 268, 271, 71 S.Ct. 325, 327, 95 L.Ed. 267 (1951). Although there is a "heavy presumption" against the validity of a prior restraint, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963), the Court has recognized that government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally, *see Cox v. New Hampshire*, 312 U.S. 569, 574-576, 61 S.Ct. 762, 765-766, 85 L.Ed. 1049 (1941). Such a scheme, however, must meet certain constitutional requirements. It may not delegate overly broad licensing discretion to a government official. *See Freedman v. Maryland, supra*. Further, any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives

for communication. *See United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 1706, 75 L.Ed.2d 736 (1983).

The plaintiffs contend that the city ordinance is facially invalid because it does not prescribe adequate standards for the city manager to apply when he chooses to grant or deny a permit. The defendant claims the regulation is merely a valid time, place and manner restriction. A government regulation that allows arbitrary application is "inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649, 101 S.Ct. 2559, 2565, 69 L.Ed.2d 298 (1981). To curtail that risk, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license" must contain "narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth*, 394 U.S., at 150-151, 89 S.Ct., at 938; *see also Niemotko*, 340 U.S., at 271, 71 S.Ct., at 327. The reasoning is simple: If the permit scheme "involves appraisal of facts, the exercise of judgment, and the formation of an opinion," *Cantwell v. Connecticut*, 310 U.S. 296, 305, 60 S.Ct. 900, 904, 84 L.Ed. 1213 (1940), by the licensing authority, "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great" to be permitted, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553, 95 S.Ct. 1239, 112 S.Ct. 2395.

The case, therefore, boils down to this issue: Does each version of § 23-42 provide narrow, objective, and definite standards to guide the city manager? If so, the regulation will be upheld as a valid time, place, and manner restriction. If such standards are not provided,

however, the risk of censorship becomes too great, and the regulation must be struck down. The question of what standards will suffice to validate a permitting scheme has been addressed recently by the Supreme Court in *Freedman v. Maryland*, 380 U.S. 51, 58 (1965), and *FW/PBS, Inc. v. City of Dallas*, 110 S.Ct. 596 (1990).

Freedman involved a challenge to the Maryland motion picture censorship statute by a theater owner. Particularly, the theater owner challenged the fact that under the scheme, the censorship – without judical involvement – could deny his film a permit, and he could not exhibit his film until after a potentially costly and time-consuming appeal to the courts. The Supreme Court agreed that this scheme was unconstitutional, and imposed three procedural safeguards that licensing schemes must provide: (1) The censor must make the decision to grant the license to show the film or go to court to restrain showing the film; (2) any restraint in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial discretion; and (3) the procedure must also assure a prompt final judical decision. Thus, under *Freedman*, it is the censor who must go to court to restrain showing of a certain film.

Freedman involved a licensing scheme which expressly involved a censor making a decision upon the content of a piece of expression. In *FW/PBS, Inc. Dallas*, 110 S.Ct. 596 (1990), however, the Court considered a licensing scheme which, though aimed at a particular industry, purported to be a content neutral licensing

scheme. The case involved a Dallas ordinance which regulated adult-oriented businesses through a scheme incorporating zoning, licensing and inspections. While the Court struck down the ordinance for failing to provide the first two safeguards, it also ruled that the third was not required. The Court held that under Dallas' business licensing scheme, "the city does not exercise discretion by passing judgment on the content of any protected speech." *Id.* at 607. If such discretion were exercised, "it would be presumptively invalid, and, therefore, the censor in *Freedman*, was required to carry the burden of going to court." *Id.* Instead, the city merely reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid, thus, "the First Amendment does not require that the city bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court." *Id.* at 607.[1]

---

[1] This court acknowledges that *FW/PBS* was a fractured decision in which no majority of the court concurred completely in any one of the opinions written in that case. This court will follow the mandate of *Marks v. United States*, 430 U.S. 188, 193 (1977) in interpreting *FW/PBS*, however, and will determine the narrowest basis upon which a majority of the justices agree. As the Eleventh Circuit found in *Redner v. Dean*, 29 F.3d 1495, 1500 (11th Cir. 1994), this court concludes that the narrowest basis of agreement from *FW/PBS* is that only the first two procedural requirements are necessary when the case involves a mere licensing or permitting scheme rather than a censorship system, as those terms are used in *FW/PBS*.

A. What procedural safeguards are necessary?

After *FW/PBS*, the procedural safeguards that permitting schemes must provide differ according to whether the scheme is a "censorship system" or a mere licensing scheme. The plaintiffs assert that this case is closer to *Freedman v. Maryland*, and thus three procedural safeguards are necessary here. First the city must make the decision whether to issue the permit within a specified and reasonable time period during which the status quo is maintained. *Freedman*, 85 S.Ct. at 734. Second, there must be the possibility of prompt judicial review in the event that the permit is denied. *Id.* Finally, assert the plaintiffs, the city must bear the burden of going to court in order to suppress the speech and the burden of proof once in court.

The defendant agrees that the first two safeguards are required in this case, but asserts that the third is not. This is because the new version of § 23-42 is not a "censorship system" requiring the censor to have the burden of going to court to suppress the speech. Instead, according to defendant, the new version of § 23-42 is more like the licensing scheme in *FW/PBS, Inc. v. City of Dallas*, 110 S.Ct. 596 (1990).

The question, therefore, is whether the new version of § 23-42 is closer to the scheme involved in *Freedman* or to that involved in *FW/PBS*. In its prior order granting a preliminary injunction regarding the former version of § 23-42, this court held that § 23-42 was unconstitutional because it failed to provide all three safeguards, including the placement of the burden to go to court on the city. The court did so because the prior version of § 23-42,

which allowed the city manager to deny a permit based on a history of illegal activity, thereby allowed the city manager to restrain speech based on a subjective expectation of what someone might do at the event. This rendered the former version of § 23-42 an exercise of discretion in passing judgment on the possible content of protected activity. Thus, the prior version of § 23-42 was closer to the type of "direct censorship of particular expressive material", *FW/PBS*, 110 at 606-07, involved in *Freedman* than to the type of licensing scheme in *FW/PBS*. Accordingly, the court now holds that, as stated in the order granting preliminary injunction, the former version of § 23-42 should have provided all three procedural safeguards from *Freedman*. Moreover, for the reasons given in the order granting preliminary injunction, the court concludes that the prior version of § 23-42 did not meet the standards in *Freedman* and was unconstitutional.

The current version of § 23-42 no longer contains the section allowing the city manager to deny a permit based on a reasonable likelihood of criminal activity. It requires the permit to be granted except in 4 clearly defined situations. The permit can be denied if the activity or event: (1) will unreasonably interfere with the flow of vehicular and pedestrian traffic; (2) will unreasonably deny access to any properties or areas of the city by vehicular or pedestrain traffic, (3) will cause imminent danger or health hazard to any person or will damage any public or private property, or (4) will create an unreasonable demand upon the city's emergency services personnel and equipment, so as to cause potential deficiencies in such services.

In order to determine whether any of these dangers are present, the city manager does not need to "exercise discretion by passing judgment on" any possible speech or conduct. These concerns are content-neutral and so are not presumptively invalid. Thus, while the current § 23-42 must provide the first two procedural safeguards from *Freedman*, the city does not, when denying a permit, have to bear the burden of going to court first and the burden of proof once it gets there.

Thus, we now turn to an examination of whether the first two procedural safeguards are provided by the amended version of § 23-42. First, the section must require the granting or denial of the permit within "a specified and reasonable time period during which the status quo is maintained." Section 23-42 requires the application to be filed at least ten days before the event unless: (1) the event is an unexpected event, (2) the application was filed as soon as practicable, and (3) the event will be rendered impossible or substantially ineffective if the event is delayed. The city manager must grant or deny the application within 5 business days after the receipt of it, or within one day if the ten day period is waived as described in the preceding sentence.

The provision does not contain any restriction on how early the applicant can apply. Thus, if applicants choose, they can file months before the date of their event, and the city manager must make a decision within 5 days. The applicant will then be left with a great deal of time to pursue judicial review. Thus, standing alone, the time limits on the city manager or designee to decide the application meet the requirements of *Freedman*. In *FW/PBS, Inc.*, the licensor had to rule within 30 days, but

certain inspections were also required, and no time limits were imposed on those inspections. There are no hidden requirements like that in this case.

The issue of availability of prompt judicial review is more troublesome in this case, however, because the city is not in a position to guarantee a prompt final judicial decision. At first blush, one could say that prompt judicial review is always available any time a permit is denied: the applicant could simply seek a temporary restraining order, and the court must rule within 20 days. In the context of the censorship systems, however, the court has required more than this. In *Freedman*, the Court required not only prompt judicial review, but also "a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Freedman*, 380 U.S. at 59.

In *Freedman*, the legislative body that passed the regulation under review, the state legislature itself, also had the authority to determine the jurisdiction and function of the state courts. Thus, the state legislature had the authority to require prompt final judicial decisions in cases involving the review of a license denial. In the instant case, the entity which enacted the permitting scheme is a city and does not have the authority to bind the state courts to review and quickly issue a final decision on the permit denial. *Cf. Shuttlesworth v. Birmingham*, 394 U.S. 147, 161 and 161 n.3 (Harlan, concurring and noting that, in a case involving a City of Birmingham permitting scheme, the plaintiff could have sought a writ of mandamus in a state court but "that state court is not obliged to render a decision within any fixed period of time.").

It is tempting to conclude, therefore, that, since the City of Gainesville cannot guarantee a prompt final judicial decision, the City cannot meet the standards of *FW/PBS*. There are two problems with such a conclusion, however. First, the scheme involved in *FW/PBS* itself was enacted by a city. Thus, in the very case retaining the prompt judicial review safeguard, the governmental entity involved was not capable of ensuring a prompt final judicial decision. Second, if a prompt judicial decision is required, no permitting scheme enacted by a city can ever be valid, because a city cannot guarantee that the state courts will issue a decision on the denial of the permit within a fixed period of time. Thus, to stop a rally that a city manager feels is legitimately dangerous or contrary to the public interest, the city manager must go to court to restrain the rally. At that proceeding, the city would bear the burden of persuasion. This allocation of the burden of going to court and of persuasion at court is, paradoxically, the precise result sought to be avoided by *FW/PBS*.

Only one reading of *FW/PBS* resolves this paradox. *FW/PBS* distinguished the permitting scheme in *FW/PBS*, which it called a mere licensing scheme, from that in *Freedman*, which it called a censorship system. Censorship systems are presumptively invalid, and thus the censor must bear the burden of going to court under such systems. Moreover, when a denial under a presumptively invalid system is involved, societal interests demand the fastest possible determination of whether the decision made under that presumptively invalid scheme was correct. Because of this, any delays in the litigation process should be borne by the censor. Thus, the censor must

seek a court order before restraining the film and there must be a guarantee that a final judicial decision will be made promptly.

FW/PBS held that mere licensing schemes are not presumptively invalid. When a denial under a scheme that is not presumptively invalid is involved, the societal interest in reviewing a presumptively wrong decision is not present. Thus, because the denial under such a scheme is not presumed to be invalid, the scheme need not contain a requirement that a final judicial determination will be made within any fixed period of time. In other words, without the presumption that the denial was invalid, it is more permissible for the applicant to bear the risks of delays before a final judicial determination.

In short, the only interpretation of *FW/PBS* that makes sense is that when a licensing scheme is involved, only the right of the applicant to immediately seek a temporary restraining order is required.[2] The scheme does not have to provide a guarantee of a prompt final judicial decision or any other special judicial procedure.

---

[2] The court is aware that, in a footnote in *Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1994), the Eleventh Circuit suggested that our Circuit might require more than the state's statutory or common-law mechanisms for review of administrative decisions to satisfy the "prompt judicial review" requirement. However, in the same footnote, the Eleventh Circuit noted that other jurisdictions have taken the opposite view, *citing Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993) (en banc), *cert. denied* 114 S.Ct. 1837 (1994). Also, the Eleventh Circuit noted that our Circuit had never addressed the issue squarely and had not confronted "whether Florida's statutory or common-law means of judicial review were adequate procedural safeguards." *Redner*, 29 F.3d at 1501-02 n.9.

This interpretation, though, raises one final question: Why would the Supreme Court require a permitting scheme to provide for prompt judicial review when such review is seemingly always present anyway, in the form of a TRO? The answer lies in *Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1994). In *Redner*, the court reviewed Citrus County, Florida's adult establishment permitting scheme. In determining whether the scheme provided "prompt judicial review", the court held that the ordinance was inadequate under any interpretation of "prompt judicial review" because of the lengthy administrative appeals in the scheme. During these administrative appeals, the applicant would be barred from seeking judicial review. Thus, as *Redner* points out, *FW/PBS* requires that a content-neutral licensing scheme contain no obstacles, such as many levels of administrative review, in the way of the applicant immediately seeking a temporary restraining order.

The new § 23-42 thus provides more procedural protections than are necessary. All that is required is that the city make a decision upon the permit within a reasonable time period and that the city not impose obstacles to judicial review such as many levels of administrative remedies to exhaust. The new § 23-42 provides both of these standards. Accordingly, the new § 23-42 is not facially unconstitutional.

C. Section 15-4

The plaintiffs also mount a facial challenge to § 15-4, which sets out the procedures for obtaining a permit for relief from the maximum sound level provisions of the

other parts of chapter 15. As a threshold matter, by the terms of the plaintiffs' own complaint, they cannot bring a facial challenge to Section 15-4. The Supreme Court has permitted facial challenges only in the context of allegedly overbroad regulations or of licensing schemes that "ves[t] unbridled discretion in a government official over whether to permit or deny expressive activity." *Ward v. Rock Against Racism*, 109 S.Ct. 2746, 2755 (1989) (citing *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 769-72 (1988)). In their challenge to § 15-4, the plaintiffs do not suggest that city officials enjoy unfettered discretion to deny speech altogether, just that the city could refuse to allow amplification of sound. Thus, the justification for allowing a facial challenge is not found in this case.

Moreover, in *Ward*, the Court upheld a sound guideline whose goals were to "insure appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone of Sheep Meadow." *Ward*, 100 S.Ct. at 2755. In response to the argument that such language allowed too much discretion to the sound technician and city officials, the Court stated:

> While these standards are undoubtedly flexible, and the officials implementing them will exercise considerable discretion, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.

Id. The language in chapter 15 provides much more precise guidance than the guideline involved in *Ward*, and, like the guideline, does not allow the permitting official to deny a permit based upon the subject matter of the speech. Accordingly, because section 15-4 does not vest

unbridled discretion in the hands of permitting authorities to deny or permit expressive speech, it is not susceptible to a facial challenge.

Accordingly, it is hereby

ORDERED AND ADJUDGED:

1. Plaintiff's Motion for Partial Summary Judgment (doc. 85) is GRANTED in part and DENIED in part.

2. Plaintiff's motion for entry of final judgment (doc. 122) is GRANTED.

3. Defendant's Motion to Dismiss the second amended complaint and Motion for a more definite statement (doc. 63) is DENIED AS MOOT.

4. As stated at oral argument, Plaintiff's Motion to permit voluntary dismissal of counts III and IV (doc. 111, partially withdrawn by order at doc. 118) is GRANTED with the condition that plaintiff must show good cause before filing a claim based on the same conduct alleged in Count III.

5. Defendant's Motion for Summary Judgment on count III of the second amended complaint (doc. 103) is DENIED AS MOOT.

DONE AND ORDERED this 26th day of January, 1998.

/s/ Maurice M. Paul
MAURICE M. PAUL, SENIOR
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-02022-DD

TOM MILLER, MICHAEL KUNDERT, ET AL.,

Plaintiffs,

CANNABIS ACTION NETWORK, INC.,
KEVIN APLIN,

Plaintiffs-Appellants

versus,

City of Gainesville,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Florida

(Filed Dec. 29, 2000)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, _____F.2d_____).

Before: EDMONDSON, DUBINA, and WILSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

CHARTER LAWS

ARTICLE I. ESTABLISHMENT, CORPORATE LIMITS, AND POWERS

1.01. Establishment and general powers.

The City of Gainesville, created by chapter 12760, Laws of Florida, 1927, as amended, shall continue and is vested with all governmental, corporate, and proprietary powers to enable it to conduct municipal government, perform municipal functions, render municipal services, and exercise any power for municipal purposes, except as otherwise provided by law.

1.02. Territorial limits.

The territorial limits and boundaries of the municipality existing in Alachua County under the name of the City of Gainesville shall embrace all of the territory described as follows:

Editors' note – At the discretion of the city, the legal description of the municipal corporate limits of the city, formerly set out in § 1.02, has been placed in Appendix I to the Charter.

1.03. Construction.

(1) The powers of the city shall be construed liberally in favor of the city, limited only by the State Constitution, general law, and specific limitations contained in this act.

(2) If any provision of this act or the application thereof to any person or circumstance is held invalid by a court of competent jurisdiction, the invalidity shall not

affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

(3) All powers and authority granted by this act are supplemental and additional to all other statutory and constitutional authority.

(4) For purposes of this act, the term:

(a) "City" means the City of Gainesville.

(b) "Commission" means the city commission as established in Article II.

(c) "State" means the State of Florida.

1.04. Special powers.

In addition to its general powers, the city may:

(1) Acquire by purchase, gift, devise, lease, lease-purchase, condemnation, or otherwise, real or personal property, or any estate or interest in property, within or without the city limits, and for any of the purposes of the city, and to improve, sell, lease, mortgage, pledge, or otherwise dispose of its property or any part of its property.

(2) Acquire, purchase, hire, construct, extend, maintain, own, operate, or lease local public utilities, including: cable television, transportation, electric, telephone, and telegraph systems; wastewater and stormwater facilities; works for supplying the city and its inhabitants with water, gas, and electric energy for illuminating, heating, or power purposes; water, electric, and

gas production, transmission, and distribution systems; sanitary sewage facilities; wastewater transmission and disposal facilities; and any and all other utilities as the welfare of its residents reasonably demands.

(3) Finance local public utilities through the sale of bonds, pledging revenue, general taxation, or otherwise; sell water, electricity, gas, wastewater, or any other service, product, or commodity gathered, provided, produced, or manufactured by the city from the public utilities systems and facilities owned or operated by the city to any consumer within or without the limits of the city; and locate utility plants, distribution facilities, or any appurtenances either within or without Alachua County.

(4) Enter into agreements with other municipalities either within or without Alachua County, or with governmental units or private utility companies, for selling or buying utility services or other municipal services of any kind, wherever located; sell any surplus of water or electric energy it may have over and above the amount required to supply its own inhabitants and any other services to persons, firms, and corporations, public or private, on such terms and conditions as the commission considers appropriate; exercise all powers and authority of the city to acquire by purchase, gift, lease, lease-purchase, or otherwise, real or personal property; and exercise the power of eminent domain within Alachua County, and exercise the power of eminent domain anywhere outside the county where permitted by general law.

(5) Make reasonable rules and regulations for promoting the purity of its water supply and for

protecting it from pollution, and for this purpose may exercise full police powers and sanitary control over all lands comprised within the limits of the watershed tributary to any such supply wherever such lands may be located in this state; impose and enforce any such rules and regulations; and prevent, by injunction, any pollution or threatened pollution of such water supply and any act likely to impair the purity of the water.

(6) Acquire, build, construct, erect, extend, enlarge, improve, furnish, equip, and operate as a separate bulk power supply utility or system, electric generating plants, transmission lines, interconnections, and substations for generating, transmitting, distributing, and exchanging electric power and energy both within and without the limits of the city, including specifically all powers and immunities granted by chapter 75-375, Laws of Florida.

(7) Fix the maximum rate and establish, impose, and enforce, by ordinance, the rates to be charged for gas, electric, wastewater, and all other public utilities or other services or conveniences whether operated, rendered, furnished, or owned by the city or by any person, firm, or corporation.

(8) Require that all electric wires and all telephone and telegraph wires be placed in underground conduits; prescribe rules and regulations for constructing and using the conduits; enforce compliance with such rules and regulations; and, if the public utilities company fails or refuses to comply with such rules and regulations, construct such conduits and place the

wires underground and maintain a lien against the franchises and property of such company.

(9) Compel the abatement and removal of all nuisances within the city limits, or upon property owned by the city beyond its limits, at the expense of the person causing the nuisance or of the owner or occupant of the ground or premises where the nuisance is found; require all lands, lots, and other premises to be kept clean, sanitary, and free from weeds or make them so at the expense of the owner or occupant; regulate or prevent noisome or offensive businesses; regulate or prohibit the keeping of animals, poultry, or other fowl, or the exercise of any dangerous or unwholesome business, trade, or employment within the city limits; and regulate the transportation of all articles through the streets of the city.

(10) Provide and maintain, either within or without the city limits, charitable, recreative, curative, corrective, detention, or penal institutions.

(11) Provide and regulate hospitals within and without the city limits; enforce the removal of persons afflicted with contagious or infectious diseases to hospitals provided for them; establish and maintain a quarantine ground within or without the city limits and such quarantine regulations against infectious and contagious diseases as the city sees fit to impose; and protect the health of the public.

(12) Acquire by purchase, gift, devise, condemnation, or otherwise, lands, either within or without the city limits, to be used, kept, and improved as a place of interment of the dead;

make and enforce all necessary rules and regulations for the protection and use of all cemeteries within the city limits; and generally regulate the burial of the dead.

(13) Provide fire protection and other governmental services within and without the city limits and enter into contracts for such purposes.

(14) License, tax, cause to be registered, control of the drivers of, and fix the rate to be charged for the transportation of persons and property within the city limits and to the public works beyond the city limits; provide for parking spaces on the streets and regulate, vacate, or discontinue the right to use the parking spaces; and require bonds and sureties to be furnished for all vehicles operated for hire upon the streets of the city whether such operation is wholly within the city limits or between the city and places outside the city.

(15) Exercise full police powers over the entire width of right-of-ways of all streets and public ways which lie within, adjacent to, or partially within the city limits.

(16) Issue any bonds which municipalities are authorized to issue under the State Constitution or laws of the state, subject to the provisions of this act. For purposes of this subsection, the term "bonds" means ad valorem bonds, revenue bonds and certificates, certificates of indebtedness, special assessment bonds and certificates, tax anticipation notes, bond anticipation notes, revenue anticipation notes, and other evidences of indebtedness. The term "revenue bonds" means bonds payable solely from the revenues derived from sources of revenue other than ad valorem taxes.

The term "ad valorem bonds" means bonds and the interest thereon which are payable from the proceeds of ad valorem taxes levied on real and personal property situated within the city limits. Ad valorem bonds may be used in combination with other revenue sources.

(17) Exercise the power of eminent domain to acquire property located within Alachua County, and exercise the power of eminent domain outside the county where permitted by general law, for the purpose of locating electrical generating, transmission, or distribution facilities; sanitary sewerage or other waste collection, treatment, or disposal facilities; water production, treatment, transmission, and distribution facilities; and for use by the city in the performance of any of its duties, rights, and authority.

(18) Levy ad valorem taxes in accordance with the State Constitution and laws of the state and to levy other taxes authorized by general law.

(19) Enact ordinances relating to the repair, closing, demolition and removal of dwelling unfit for human habitation, including specifically all powers and immunities granted by chapter 63-1359, Laws of Florida.

(20) Adopt urban renewal and community development ordinances.

(21) Provide, own, and operate a public transportation system within and without the city limits and on the campuses of the University of Florida and Santa Fe Community College, unless otherwise provided by those institutions, and provide for an adequate public transportation system by contract with other agencies, either

public or private, on such terms and conditions as the city commission determines, and including specifically all powers and immunities granted by chapter 67-1413, Laws of Florida.

City of Gainesville Code
Sec. 23-42. Congregating on streets and sidewalks.

(a) *Permit required.* It shall be unlawful for persons to assemble or congregate in crowds in such numbers as to block the use of any sidewalk or street of the city without a permit from the city manager or designee, issued pursuant to this section.

(b) *Permit application.* At least ten days prior to the date of which a permit is requested, an application shall be filed with the city manager. This time limit may be shortened to as little as two business days by the city manager or his/her designee, based upon proof that, through no fault of the applicant, the timing of the event is based on an unexpected occurrence related to the purpose of the event, the application was submitted as soon as practicable and the event or activity for which the permit is filed will be rendered impossible or substantially ineffective if the event is delayed. The application shall include or be accompanied by the following:

(1) Complete information as to the type of event or activity planned, the date and time, the expected number of participants, the expected duration, and the desired location or route, along with any factors particularly affecting the choice of location or route; and

(2) A fee to cover the cost of processing the application in accordance with the schedule set out in Appendix A.

(c) *Granting or denial of permit.*

(1) *Granting of permit; time; considerations.* The city manager or designee shall grant the requested permit within five business days of receipt of

the application, or within one business day of receipt of an application asking for waiver of the ten-day prior notice requirement, if the event or activity for which it is requested:

a. Will not unreasonably interfere with the flow of vehicular or pedestrian traffic, such as when alternative routes for such traffic are unavailable or impractical;

b. Will not unreasonably deny access to any properties or areas of the city by either vehicular or pedestrian traffic;

c. Will not cause imminent danger or health hazard to any person and will not damage any public or private property; and

d. Will not create an unreasonable demand upon the city's emergency services personnel and equipment, so as to cause potential deficiencies in such services.

(2) *Use of state or federal road.* If the permit includes the closure of one or more state or federal roads, the city manager or designee shall send the necessary paperwork to the state department of transportation within five days of receipt of the application, or within one business day of receipt of an application requesting a waiver of the ten-day requirement.

(3) *Denial of permit.* If the city manager or designee finds the planned event or activity violates any of the above conditions, he or she shall inform the applicant that the permit will not be granted and request the city attorney apply to the circuit court for Alachua County for an order enjoining the applicant and other interested persons from conducting the planned event or activity.

(d) *Permit conditions.* In granting a permit, the city manager or his/her designee shall specifically limit same as to date and time, location, and duration. In addition, the city manager or his/her designee may attach conditions to the validity of the permit if such conditions are, in his/her opinion, reasonably necessary for the event or activity to meet the criteria specified in the preceding subsection (c). Such conditions may include, but are not limited to:

(1) The conduct of all or any part of the event or activity at a location or on a route, either public or private, other than the location or route requested;

(2) A change in the date, time, or duration from that requested;

(3) The barricading of street intersections and the provision of identified monitors at such barricades;

(4) The posting of bond, cash deposit, or other security, not to exceed $500.00, to cover any damage to public property and the cost of extraordinary cleaning or maintenance expenses caused by the conduct of the event or activity on public property; and

(5) Prepayment and damage deposits for any city equipment rented or used in connection with the event or activity and city services required therefor.

The applicant may petition the circuit court of Alachua County for review of the conditions placed on the permit. The court shall hear the appeal de novo without a jury, receive evidence and based upon the evidence presented

shall make findings and order that the permit be granted either upon the terms requested or conditions stated by the court, or enjoin the holding of the event or activity if there is a reasonable likelihood that it will substantially harm the public health or safety and this cannot be avoided by the imposition of conditions on the permit.

(e) *City services and equipment; cost.* If any city services are reasonably necessary for the conduct of the event or activity, such as police officers to redirect traffic (over the number of officers who would normally be on duty and available in the area) or utilities service, the city manager shall require payment by the applicant for such services. The city manager may allow the use of any city equipment for any such event or activity, at a reasonable rental therefor. For any such activity or event in which the city officially participates, and for others when directed by the city commission, such costs and rents for services and equipment shall be waived.

(f) *Revocation of permit.* Once a permit has been issued, it may be revoked by the city manager or designee for any violation of the terms and conditions thereof. Any permit may also be revoked by the city manager or designee, or by any police officer on the scene, at any time that the event or activity permitted becomes, or creates a condition, dangerous to the health or safety of any person or otherwise fails to meet the criteria specified in subsection (c) above. At any time that a permit is revoked during the event or activity for which the permit was issued, a police officer shall announce the fact of the revocation to persons assembled for the event or activity.

Supreme Court, U.S.
FILED
APR 27 2001
OFFICE OF THE CLERK

(2)

No. 00-1503

In The
Supreme Court of the United States

CITY OF GAINESVILLE, FLORIDA,

Petitioner,

v.

CANNABIS ACTION NETWORK, INC. AND KEVIN APLIN

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

RICHARD L. WILSON
Counsel of Record
3610 Dubsdread Circle
Orlando, Florida 32804-3052
(407) 649-9225

GARY S. EDINGER
305 N.E. 1st Street
Gainesville, Florida 32601
(352) 338-4440

PARTIES TO PROCEEDING

The Petitioner is the City of Gainesville, Florida, a Florida municipal corporation.

Respondent Cannabis Action Network, Inc. is a Louisiana non-profit corporation with no parent or subsidiary corporations, and no publicly owned company holds any ownership interest in the corporation.

Respondent Kevin Aplin is an individual litigant as well as a member of Cannabis Action Network, Inc.

TABLE OF CONTENTS

PARTIES TO PROCEEDING i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

ARGUMENT 2

I. THIS COURT SHOULD NOT DECIDE IF THE STREET CLOSING ORDINANCE IS A PRIOR RESTRAINT. 3

A. The question of whether the street closing ordinance is a time, place and manner regulation was not presented to the Circuit Court. 3

B. The Eleventh Circuit's determination that the street closing ordinance is a prior restraint is not in conflict with *FW/PBS*. 6

II. RESPONDENTS AGREE THAT A CONFLICT EXISTS BETWEEN THE FEDERAL CIRCUITS THAT SHOULD BE RESOLVED BY THIS COURT. 8

III. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW TWO OTHER ISSUES THAT WERE NOT ADDRESSED BY THE CIRCUIT COURT. 10

A. Certiorari is not appropriate to review the issue of whether prompt judicial review contemplates a timely disposition on the merits. 11

B. Likewise, the Court should not review the issue of whether a licensing scheme must specifically provide for judicial review. 13

CONCLUSION 14

TABLE OF AUTHORITIES

Beal v. Stern, 184 F.3d 117 (2nd Cir. 1999) 1, 10

Bledsoe v. City of Jacksonville Beach, 20 F.Supp.2d 1317 (M.D. Fla. 1998) 1

Boss Capital, Inc. v. City of Casselberry, 187 F.3d 1251 (11th Cir. 1999) 8, 11

Breininger v. Sheet Metal Workers International Association Local Union No. 6, 493 U.S. 67 (1989) ... 5

Cannabis Action Network, Inc. v. City of Gainesville, 231 F.3d 761 (11th Cir. 2000) ..... *passim*

Davis v. United States, 495 U.S. 472 (1990) 5

Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981) .. 4, 5

Dumas v. City of Dallas, 648 F.Supp. 1061 (N.D. Tex. 1986) 6

Florida Cannabis Action Network, Inc. v. City of Jacksonville, 130 F.Supp.2d 1358 (M.D. Fla. 2001) ... 1

Freedman v. Maryland, 380 U.S. 51 (1965) ..... *passim*

FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298 (5th Cir. 1988) 7

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) ..... *passim*

Graff v. City of Chicago, 9 F.3d 1309 (7th Cir. 1993) (en banc) 9-10

Lyes v. City of Riviera Beach, 166 F.3d 1332 (11th Cir. 1999) 8

MacDonald v. City of Chicago, 243 F.3d 1021 (7th Cir. 2001) 1, 9

MacDonald v. Safir, 206 F.3d 183 (2nd Cir. 2000) 1

Matsushita Electrical Industrial Co., Ltd. v. Epstein, 516 U.S. 367 (1996) 12-13, 14

National Collegiate Athletic Association v. Smith, 525 U.S. 459 (1999) 13, 14

Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206 (1998) 13

Renton v. Playtime, Theatres, Inc., 475 U.S. 41 (1986) 7

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 14

Thomas v. Chicago Park District, 227 F.3d 921 (7th Cir. 2000) (*Pet. For Cert. Pending*, 69 USLW 3530 (Feb 01, 2001) (No. 00-1249)) 1, 6, 9, 10, 13

United States v. Mendenhall, 446 U.S. 544 (1980) 5

STATEMENT OF THE CASE[1]

There are some misstatements and omissions in the Petitioner's Statement of the Case which warrant correction and inclusion. As an initial matter, Cannabis Action Network, Inc. is not a rag-tag group engaged in civil disobedience against the nation's marijuana laws. To the contrary, the group has undertaken a mission to educate the public as to the legitimate medicinal, industrial and food uses of cannabis hemp. (App. 2). CAN, its members and associated organizations have found it necessary to resort to litigation in order to hold public rallies in public parks, when permits have been routinely denied by hostile governments. *See, e.g., Thomas v. Chicago Park District*, 227 F.3d 921 (7th Cir. 2000) (*Pet. For Cert. Pending*, 69 USLW 3530 (Feb 01, 2001) (No. 00-1249)); *MacDonald v. City of Chicago*, 243 F.3d 1021 (7th Cir. 2001) (*Pet. for Cert. to be filed*); *Beal v. Stern*, 184 F.3d 117 (2nd Cir. 1999); *MacDonald v. Safir*, 206 F.3d 183 (2nd Cir. 2000); *Bledsoe v. City of Jacksonville Beach*, 20 F.Supp.2d 1317 (M.D. Fla. 1998); *Florida Cannabis Action Network, Inc. v. City of Jacksonville*, 130 F.Supp.2d 1358 (M.D. Fla. 2001).

This challenge to the Gainesville street closing ordinance began well before the date suggested by the City. The trial court initially required the issuance of a street closing permit as supplemental relief incident to the preliminary injunction. (App. 3) The constitutionality of the ordinance was challenged in the first Amended Complaint filed only a few months after the preliminary injunction

---

1. Pursuant to Rule 24(g), Respondents submit this brief Statement of the Case, to add certain facts from the Record that they believe will better enable the Court to understand the case. With the exception of these omitted facts the City's Statement of the Case is acceptable to Respondents.

issued. This challenge was carried over in the Second Amended Complaint and was not a new cause of action.

The City does not mention that the Gainesville noise ordinance was also challenged as an unconstitutional prior restraint. Respondents could not effectively conduct a public rally without having both a street closing permit and a noise permit. (App. 3). The district court rejected Respondents' challenge against the noise permit. (App. 51-53). However, on appeal, the Eleventh Circuit reversed, finding that the noise permit was a prior restraint (App. 13-20), that failed to include any of the *Freedman* protections for free speech events. (App. 22-23).[2]

ARGUMENT

In asking this Court to review the decision of the United States Court of Appeals for the Eleventh Circuit, the City of Gainesville claims that the decision is in conflict with a decision of this Court – *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) – and with decisions of other federal circuit courts. With but a single exception, the City's claims are not properly before this Court, and review of all except that one issue is foreclosed.

---

2. While the City filed a petition for rehearing and rehearing *en banc* as to the street closing ordinance, it did not do so with respect to the noise ordinance. Similarly, the City has not asked this Court to review the Eleventh Circuit ruling striking down the noise ordinance as a prior restraint. Therefore, this Petition is limited to the street closing ordinance only.

I. THIS COURT SHOULD NOT DECIDE IF THE STREET CLOSING ORDINANCE IS A PRIOR RESTRAINT.

The City asks this Court to review the Eleventh Circuit's finding that the City's street closing ordinance is a prior restraint. The City asks the Court to find that it is, instead, a time, place and manner regulation. There are two compelling reasons why this Court should not review that issue: (1) the issue was not presented to the Court of Appeals; and (2) there is no conflict with any prior decisions of this Court.

A. The question of whether the street closing ordinance is a time, place and manner regulation was not presented to the Circuit Court.

This Court is asked to consider an issue that was not properly preserved. In its Petition the City makes the following statement:

> The Eleventh Circuit panel correctly acknowledged that *Freedman*'s procedural safeguards only apply to regulatory schemes that censor the content of speech, i.e., regulations which constitute a prior restraint. (App. 20). However, from that premise, the court made a key error by treating the Gainesville ordinance as a prior restraint when the ordinance is in reality a time, place and manner restriction.

Petition, at 8.[3]

But in footnote 7 the City admits that the issue it pursues here was not raised in the Court of Appeals:

> [7] Although the parties did not argue that the street/sidewalk closing ordinance was not a prior restraint, the Petitioner was wrong not to contest that issue. (App. 13).[4]

In *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981) the petitioner attempted to raise an issue not presented to the circuit court: that the district court had abused its discretion in ruling on a motion for costs and fees. This Court said:

> Although defendant's petition for certiorari presented the question of the District Judge's abuse of discretion in denying defendants costs under Rule 54(d), that question was not raised in the Court of Appeals and is not properly before us.
>
> 450 U.S. at 362.

---

[3] The City's claim of what the Eleventh Circuit "acknowledged" is a gross distortion of the language in the opinion. Neither on page 20 of the Appendix – cited by the City – nor at any other place in its opinion did the Circuit Court make any statement like that attributed to it.

[4] The City cites to p. 13 of its Appendix, where the Court of Appeals wrote: "We need not determine if the Street Closing Ordinance is a prior restraint because both parties, as well as the district court, properly agree that it is."

In *Davis v. United States*, 495 U.S. 472 (1990), the Court refused to consider a question not properly preserved for review:

> Petitioners also assert that because their sons are agents of the Church authorized to receive payments to support their own missionary efforts, payments made to their sons are payments to the Church. Because this argument was neither raised before nor decided by the Court of Appeals, we decline to address it here. *See, e.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362; *United States v. Mendenhall*, 446 U.S. 544, 551, 552, n. 5 (1980).

495 U.S. at 488-89.

And in *Breininger v. Sheet Metal Workers International Association Local Union No. 6*, 493 U.S. 67 (1989), the Court rejected an attempt to raise a claim not presented below:

> We do not pass on petitioner's claim that certain of his rights secured by the LMRDA were "infringed" by respondent's conduct, in violation of §102, 29 U.S.C. §412 (1982 ed.), because the claim was neither presented to nor decided by the Court of Appeals below, and thus is not properly before us.

493 U.S. at 94, fn. 18.

This Court should not now review what the Eleventh Circuit was not asked to decide.[5]

B. The Eleventh Circuit's determination that the street closing ordinance is a prior restraint is not in conflict with *FW/PBS*.

Even if the issue of whether the ordinance was a prior restraint had been raised in the Circuit Court, the Eleventh Circuit's ruling is not in conflict with any decision of this Court. At page 12 of its Petition, the City makes the incorrect claim that:

> . . . the business licensing scheme under scrutiny in *FW/PBS* [*Inc. v. City of Dallas*, 493 U.S. 215 (1990)] was aimed at the content of expressive activity, i.e., sexually explicit speech of the businesses regulated by the licensing ordinance . . . .

To the contrary, the licensing scheme in *FW/PBS* was as content-neutral as it could be; it did not make any provision for the chief of police to pass on the content of the material sold or exhibited when processing a license application.[6] While the Dallas licensing ordinance only

---

[5] Respondents readily acknowledge that *if* the issue had been argued in the Eleventh Circuit, and *if* that Court had found the Street Closing Ordinance to be a prior restraint, the decision would be in direct and irreconcilable conflict with the Seventh Circuit's opinion in *Thomas v. Chicago Park District*, 227 F.3d 921 (7th Cir. 2000)(petition for writ of certiorari pending, Docket No. 00-1249).

[6] The Dallas ordinance is reproduced in its entirety in *Dumas v. City of Dallas*, 648 F.Supp. 1061 (N.D. Tex. 1986), the case that eventually reached this Court as *FW/PBS*.

applied to sexually oriented businesses, that does not mean that it was content-based. For, as this Court explained in *Renton v. Playtime, Theatres, Inc.*, 475 U.S. 41 (1986), the fact that an ordinance only regulates a certain class of businesses based on the content of the entertainment presented does not make the ordinance content-based.

This Court found the Dallas ordinance to be a prior restraint, after the Fifth Circuit had held that it was a time, place and manner regulation.[7] Both the Eleventh Circuit and the district court found the Gainesville street closing ordinance to be a prior restraint. There is no conflict with *FW/PBS*.

The City argues that *Freedman* does not apply to licensing ordinances, but is limited to ordinances that authorize the government to pass directly on the content of the material. That position ignores the statement in the plurality opinion in *FW/PBS* that:

> Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license.
>
> 493 U.S. at 226.

It does not seem to matter whether the ordinance directly authorizes censorship or silently permits it by avoiding *Freedman*'s constitutional protections. Either way

---

[7] *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988).

speech is the victim of suppression and core political speech is not spared.

II. RESPONDENTS AGREE THAT A CONFLICT EXISTS BETWEEN THE FEDERAL CIRCUITS THAT SHOULD BE RESOLVED BY THIS COURT.

The City correctly states that a direct conflict exists between the Seventh and Eleventh Circuits on whether a city must bear the burden of seeking judicial review when it denies a permit for a political rally in a public park. In this case the Eleventh Circuit said:

> In the case before us, the censored party lacks the business incentive to pursue review through the courts, and the speech at issue is core political speech in a public forum. Thus, once again, "[w]e believe this is a situation for 'treating unlike things differently according to their differences.' " *Boss Capital*, 187 F.3d at 1256 (quoting *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1342 (11th Cir. 1999)). The right to speak sought by CAN in this instance deserves greater protection than that outlined by the plurality in *FW/PBS*. Accordingly, we decline to relieve the City of the requirement that its Street Closing Ordinance meet *Freedman*'s first procedural safeguard [requiring government to initiate judicial review and bear the burden of proof in court].
>
> (App. 31).

In *Thomas v. Chicago Park District*, 227 F.3d 921 (7th Cir. 2000) the Seventh Circuit was confronted with the identical issue. The Chicago Park District's ordinance made no mention of judicial review, leaving the burden of seeking review on the unsuccessful applicant. The Court wrote:

> The plaintiffs argue that the park district should in every case in which it denies a permit be required to seek judicial review of its own action. The argument is based on a misreading of *Freedman v. Maryland*, *supra*, 380 U.S. at 58-59, 85 S.Ct. 734, which holds only that the government may not regulate the content of speech without judicial authorization and so does not extend to time, place, and manner licensing systems. The Supreme Court made that clear in *FW/PBS, Inc. v. City of Dallas* (citation omitted).
>
> 227 F.3d. at 926.

And in *MacDonald v. City of Chicago*, 243 F.3d 1021 (7th Cir. 2001), the Seventh Circuit analyzed an ordinance requiring a permit for a parade on any city street or sidewalk. In that case the Court said:

> This court has likewise concluded, based on the rationale of *FW/PBS*, that a content-neutral licensing or permit statute need not include a provision requiring the government to bear the burden of going to court to deny a permit. *Thomas*, 227 F.3d at 926-27. *See also*, *Graff*, 9 F.3d at 1324 n. 11; id. at 1330 (Flaum, J. concurring)

> ("Further, after *FW/PBS*, it seems likely that *Freedman*'s third requirement--that the licensor bear all court-related burdens--does not apply in this case."). *Accord*, *Beal v. Stern*, 184 F.3d 117, 128 (2d Cir. 1999) (because park permit ordinance was content-neutral prior restraint, it "need comply with only the first two *Freedman* factors."). Therefore, based on *FW/PBS*, *Thomas* and *Graff*, we conclude that Chicago ordinance Section 10-8-330 need not satisfy the third *Freedman* standard.
>
> 243 F.3d at 1036.

Clearly, then, there is a direct conflict on this issue of critical constitutional importance. Respondents agree with the City of Gainesville that the conflict should be resolved by this Court.

III. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW TWO OTHER ISSUES THAT WERE NOT ADDRESSED BY THE CIRCUIT COURT.

Respondents have already argued that the Court should not decide whether the street closing ordinance is a prior restraint or a time, place and manner, because the issue was never presented to the Eleventh Circuit. A similar rationale applies to two other questions the City presents.

A. Certiorari is not appropriate to decide whether prompt judicial review contemplates a timely disposition on the merits.

The City quite correctly notes that there is a significant split among the federal circuits over the issue of judicial review of licensing determinations affecting free speech interests. The circuits are hopelessly divided between those which hold that mere access to the courts is sufficient and those which require prompt judicial disposition before a restraint may be imposed.[8]

The City is also correct when it states that the issue is one of national significance because it involves the most fundamental of rights. However, certiorari would be improper in this case because the issue of prompt judicial review was simply not decided by the Eleventh Circuit below.

The Eleventh Circuit found the street closing ordinance to be unconstitutional because it did not require the City to bear the burden of initiating judicial review following the denial of a permit. (App. 30-32). But the Court did not reach the issue of judicial review the City asks this Court to decide. Indeed, the Court said it was not ruling on the question:

> Importantly, we limited ourselves in *Boss Capital* to the specific facts before us and declined to answer the unposed question of whether *Freedman*'s requirement of "prompt

---

[8] The City's recitation of the conflicting Circuit Court opinions in footnotes 11 and 12 of its Petition is essentially accurate. (Pet. 25, fn 11, 12).

> judicial review" demanded explicit provision for prompt judicial determination in challenges not involving business licensing schemes. *See id.* at 1256-57. ***For the reasons explained below, we need not answer that difficult question today.***
>
> App. at 26 (emphasis added).

The District Court also avoided ruling on this precise issue, deciding instead that prompt judicial review was not required at all for licensing schemes:

> *FW/PBS* held that mere licensing schemes are not presumptively invalid. When a denial under a scheme that is not presumptively invalid is involved, the societal interests in reviewing a presumptively wrong decision is not present. Thus, because the denial under such a scheme is not presumed to be invalid, the scheme need not contain a requirement that a final judicial determination will be made within any fixed period of time. In other words, without the presumption that the denial was invalid, it is more permissible for the applicant to bear the risks of delays before a final judicial determination.
>
> App. at 50.

This Court has stated that it will not grant a request for certiorari where the purported issues are not fully and squarely addressed by the lower Courts. *See, e.g., Matsushita Electrical Industrial Co., Ltd. v. Epstein*, 516 U.S. 367, 379, fn 5 (1996) ("[W]e generally do not address

arguments that were not the basis for the decision below..."); *National Collegiate Athletic Association v. Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below"). *Compare*, *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998) ("Petitioners raise this question in their brief . . . but it was addressed by neither the District Court nor the Court of Appeals . . . Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

In this case, the issue of the meaning of prompt judicial review was not simply overlooked – it was specifically avoided by the Eleventh Circuit. While the issue of prompt judicial review is fascinating and compelling – and is the first question presented in the petition in *Thomas v. Chicago Park District*, Docket No. 00-1249 – it is not presented by this case and cannot serve as a reason for granting certiorari.

B. Likewise, the Court should not review the issue of whether a licensing scheme must specifically provide for judicial review.

The Circuits are also divided over a sub-issue of the judicial review question: whether licensing ordinances affecting free speech must specifically provide for judicial review in the ordinance itself. While this sub-issue is also of surpassing importance to the protection of free speech, the Eleventh Circuit did not address the question in its opinion. As noted above, with respect to judicial review generally, the Eleventh Circuit decided this case on alternate grounds – namely the burden of initiating litigation. (App. 30-32).

The only mention of this issue in the Eleventh

Circuit opinion occurs in a footnote to the general discussion on judicial review. (App. 25, fn 18). There, the Eleventh Circuit merely notes that some of the Circuits disagree over whether an ordinance must specify a means of judicial review. The Court mentions that some of the Circuits have distinguished the case of *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) on its facts. However, the Eleventh Circuit did not apply or construe *Southeastern Promotions* and, instead, ruled on other grounds.

The closest the City of Gainesville can come to stating an issue for certiorari is to suggest that "reading between the lines, it appears that the court has staked out a position . . . ." Pet. at 28). However, one does not need to read between the lines to conclude that the Eleventh Circuit did "*not answer that difficult question.*" (App. 26). The jurisprudential rules governing certiorari suggest that this Court should not answer that difficult question either because the issue was not decided below. *Matsushita Electrical, supra; National Collegiate Athletic Association, supra.*

CONCLUSION

Respondents find themselves in the unusual position of asking this Court to review a case in which Respondents overwhelmingly prevailed below. Were this Court to deny the City's Petition, the Eleventh Circuit opinion would be the law in the states of Florida, Georgia and Alabama.

But Respondents are not isolated and alone in their efforts. They believe it is critical to their efforts that they, their members and affiliated organizations be allowed to hold rallies in public parks across the nation. Without a national movement, their cause is hopeless. The citizens of

Chicago and New York and every other city in the country deserve to hear and consider Respondents' message and judge its validity for themselves. They should not be denied access to that message because of the hostility of local governments opposed to any change in the laws.

Thus, Respondents are willing to sacrifice their victory in this case, in order that this Court might review and resolve the conflict among the circuits on the single issue truly presented by this case. Respondents ask the Court to grant the Petition for Writ of Certiorari, limited to Question II: whether the government is required to initiate judicial review, and bear the burden of proof, when it denies its citizens the right to engage in political speech in the quintessential public forum.

Respectfully submitted,

Gary S. Edinger
305 N.E. 1st Street
Gainesville, Florida 32601
352.338.4440

Richard L. Wilson
Counsel of Record
3610 Dubsdread Circle
Orlando, Florida 32804
407.649.9225

Attorneys for Respondents

April 27, 2001

FILED
APR 30 2001
OFFICE OF THE CLERK

(3)

NO. 00-1503

IN THE

Supreme Court of the United States

THE CITY OF GAINESVILLE, FLORIDA,
Petitioner,

v.

CANNABIS ACTION NETWORK, INC. AND KEVIN APLIN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE FLORIDA LEAGUE OF CITIES, INC., THE GEORGIA MUNICIPAL ASSOCIATION AND THE CITY OF ORLANDO, FLORIDA IN SUPPORT OF PETITIONER THE CITY OF GAINESVILLE, FLORIDA

HENRY W. UNDERHILL, JR.
General Counsel/Executive Director
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
1110 Vermont Avenue, N.W.
Suite 200
Washington, D.C. 20005
(202) 466-5424

Counsel of Record for the *Amici Curiae*

(*Additional Counsel Listed on Inside Cover*)

OFFICE OF THE CLERK
FILED
Supreme Court, U.S.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

20pp

LANI L. WILLIAMS
Associate Counsel
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
1110 Vermont Avenue, N.W.
Suite 200
Washington, D.C. 20005
(202) 466-5424

HARRY MORRISON, JR.
General Counsel
FLORIDA LEAGUE OF CITIES, INC.
P.O. Box 1757
Tallahassee, Florida 32303-1757
(850) 222-9684

W. SCOTT GABRIELSON
City Attorney
JODY LITCHFORD
Chief Assistant City Attorney
CITY OF ORLANDO, FLORIDA
CITY HALL
Third Floor
400 South Orange Avenue
Orlando, Florida 32801-3302
(407) 246-3470

SUSAN PRUETT
General Counsel
Georgia Municipal Counsel
GEORGIA MUNICIPAL ASSOCIATION
201 Pryor Street S.W.
Atlanta, Georgia 30303
(404) 688-0472

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT FOR GRANTING THE WRIT OF CERTIORARI	4
I. THE CITY OF GAINESVILLE, FLORIDA'S PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT'S DECISION MISAPPLIES *FREEDMAN V. MARYLAND*, AND OTHER SUPREME COURT DECISIONS IN THE CONTEXT OF CONTENT-NEUTRAL TIME, PLACE, AND MANNER REGULATIONS	5
A. This Court's Precedents	6
B. The Eleventh Circuit's Action	8
II. THE CITY OF GAINESVILLE, FLORIDA'S PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH OTHER UNITED STATES COURTS OF APPEALS' DECISIONS	10
CONCLUSION	15

TABLE OF AUTHORITIES

CASES Page

Beal v. Stern, 184 F.3d 117 (2nd Cir. 1999) 12, 13
Hill v. Colorado, 530 U.S.703 (2000) 8
Cox v. New Hampshire, 312 U.S. 569 (1941) 7
Freedman v. Maryland, 380 U.S. 51 (1965) ..... *passim*
FW/PBS v. City of Dallas, 493 U.S. 239 (1990) ... *passim*
Graff v. City of Chicago, 9 F.3d 1309 (7th Cir. 1993) 10
Jews for Jesus, Inc. v. Massachusetts Bay Transportation Authority, 984 F.2d 1319 (1st Cir. 1993) 13
MacDonald v. City of Chicago, 243 F.3d 1021, (7th Cir. 2001) 10, 11
Thomas v. Chicago Park District, 227 F.3d 921 (7th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3530 (U.S. February 1, 2001) (No. 00-1249) 11, 12

OTHER

Black's Law Dictionary (6th Edition 1990) 8

Brief of Amici Curiae
International Municipal Lawyers Association,
the Florida League of Cities, Inc.,
the Georgia Municipal Association and
the City of Orlando, Florida
in Support of Petitioner
the City of Gainesville, Florida

Amici curiae International Municipal Lawyers Association, the Florida League of Cities, Inc., the Georgia Municipal Association and the City of Orlando, Florida, file this brief in Support of Petitioner the City of Gainesville, Florida and have a compelling interest in the legal issues presented by this case.[1]

INTEREST OF AMICUS CURIAE

The International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan professional organization consisting of more than 1,400 members. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities. IMLA has provided services and educational programs to local governments and their attorneys since 1935. IMLA is

---

[1] Pursuant to this Court's Rule 37.2(a), letters of consent from both parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, amici represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

Since its establishment, IMLA has advocated for the rights and privileges of local governments, and the attorneys who represent them, through its Legal Advocacy Program. Specifically, the Legal Advocacy Program of IMLA serves the membership by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as an amicus curiae on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

IMLA's specific interest in this case stems from the impact that the Court of Appeals' ruling will have on local governments throughout the Eleventh Circuit, as well as potentially throughout the United States. IMLA, as an organization promoting legal issues on behalf of local governments, therefore, files this brief on behalf of its members nationwide.

The Florida League of Cities ("FLC") is a voluntary organization whose membership consists of municipalities and other units of local government rendering municipal services in the State of Florida. Its membership presently numbers some 400 municipalities and three charter counties. Under its Charter, the FLC's purpose is to work for the general improvement of municipal government and its efficient administration; and to represent its members before the various legislative, executive, and judicial branches of government on issues pertaining to the welfare of its members.

The Georgia Municipal Association ("GMA") is a nonprofit corporation created for the purpose of improving municipal government. Its membership is comprised of Georgia cities and towns which, by action of their governing bodies, elect to become members. GMA membership consists of 482 municipal corporations in which more than 99 percent of state's municipal citizens reside. The Association's purposes include "promotion of the general welfare of municipalities and urban areas of this State." GMA periodically files amicus briefs in cases such as the one at bar, which are of statewide interest and will have a substantial impact on the municipalities and the cities which GMA serves.

The City of Orlando is a municipality within the State of Florida and will be one of the cities which will need to comply with the Eleventh Circuit's decision if it remains unchanged.

SUMMARY OF THE ARGUMENT

The amici are interested in this case for its far-reaching implications in reference to permitting ordinances for activities such as parades, street closures, and the use of local government parks and other property. The requirement that local governments seek affirmative court approval for permit denials is extremely onerous and contrary to Supreme Court precedent, as well as contrary to the decision of other appellate courts. The theoretical effect in the Eleventh Circuit is that local governments immediately will have to spend significant personnel and other resources to obtain court permission each and every time a permit application is not approved exactly "as is." The practical effect is that,

many local governments, because of the significant required expenditure of resources under this decision, will rarely deny a permit application or grant the application with modifications. Rather, these governments will simply grant permit applications as requested for fear of lengthy court battles, much to the detriment of their communities at large.

Additionally, courts outside the Eleventh Circuit, at both the state and federal trial and appellate levels, are now forced to choose between the reasoning of the Eleventh Circuit and the reasoning of the First, Second, and Seventh Circuits when interpreting Supreme Court precedent while reviewing local government permitting schemes. Specifically, the Seventh Circuit has refused to analyze similar permitting schemes as prior restraints, while the Second and Seventh Circuits have applied limited prior restraints analysis.

Because of the important nature of this case, its departure from Supreme Court precedent, and the split in the circuits which has developed, amici urge that this Court grant the petition for certiorari.

ARGUMENT FOR GRANTING THE WRIT OF CERTIORARI

The amici file this brief in support of the City of Gainesville, Florida's petition for certiorari. The amici submit the Eleventh Circuit decided an important question of federal law in a way that conflicts with the decisions of this Court. The amici further submit the Eleventh Circuit entered a decision in conflict with the decisions of other United States Courts of Appeals on the same question of federal law. These

factors make this case one of exceptional importance and appropriate for review by this Court.

I. THE CITY OF GAINESVILLE, FLORIDA'S PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT'S DECISION MISAPPLIES *FREEDMAN v. MARYLAND*, AND OTHER SUPREME COURT DECISIONS, IN THE CONTEXT OF CONTENT-NEUTRAL TIME, PLACE, AND MANNER REGULATIONS.

The Eleventh Circuit's decision holds that a content-neutral permitting scheme which requires a permit to close a street for a demonstration must be reviewed under *Freedman v. Maryland*, 380 U.S. 51 (1965), and is unconstitutional unless the scheme complies with three procedural safeguards. The three safeguards required by *Freedman* are: 1) that upon the denial of the permit, the permitting authority must bear the burden of initiating judicial proceedings, as well as the burden of proof; 2) that any restraint prior to judicial determination can be only for a specified period of time during which the status quo is maintained; and 3) that there must be an assurance of a prompt judicial review. The Eleventh Circuit noted the Respondents conceded the Gainesville ordinance complies with the second safeguard. Pet. App. 24. The Court of Appeals implied that in non-business licensing schemes, prompt access to judicial review (the third requirement) required more than simple access to judicial review, though it declined to address the question directly. Pet. App. 26. Instead, the Court of Appeals found the Gainesville Street Closing Ordinance unconstitutional because, upon denial of a permit, it fails to place the burden

of seeking judicial review (the first requirement) on the City of Gainesville.[2] Amici respectfully submit this holding, as applied to content-neutral regulations, is based on a misapplication of *Freedman*, and goes far beyond the protection the *Freedman* court sought to establish. Further, the Court of Appeals holding is contrary to the precedents of this Court in reviewing content-neutral permitting schemes. For this reason, this Court should grant the petition for certiorari.

A. This Court's Precedents

In *Freedman*, this Court examined a Maryland motion picture *censorship* statute that required a theater submit films to a State Board of Censors and obtain a license before showing the film. The State Board conceded the film at issue did not violate statutory obscenity standards, and conceded further the film would have been granted a license had it been submitted for review. Nonetheless, the State Board contended the appellant was properly convicted for failing to submit the film to the State Board.

---

[2] Interestingly, by requiring that the City seek judicial review, the Court of Appeals essentially answered the question it ostensibly reserved. If the City bears the burden of going to court, then logically, the requirement of "prompt judicial review" is not limited to mere *access*; rather, it requires a prompt judicial *determination*. To determine otherwise renders the affirmative requirement of *seeking* review meaningless, for surely a city would not be able to sit back and "twiddle its thumbs" awaiting a decision at some unknown time.

The appellant argued the statutory scheme constituted an invalid prior restraint because it presented the danger of "unduly suppressing" protected expression; that is, the scheme effectively *censored* protected speech. The *Freedman* court concurred, holding statutory *censorship* schemes, such as those presented by the Maryland statute, must satisfy the three requirements outlined above.

However, the Gainesville ordinance, like other local government street closure ordinances throughout the United States, should not be reviewed as a prior restraint. Some sixty years ago, in a very similar case, this Court reviewed an ordinance requiring a permit to demonstrate on a public street or sidewalk and upheld the ordinance as a valid time, place, and manner regulation. In *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941), this Court stated

> [t]he authority of a municipality to impose restrictions in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the street of cities is the most familiar illustration of this recognition of social need.

This Court upheld the *Cox* ordinance without reference to "prior restraint" analysis. As in *Cox*, ordinances like the one at issue here should not be viewed under the framework of *Freedman*, where a censor is engaged in censorship of expressive material. Rather, they should be viewed and

analyzed as content-neutral time, place, and manner regulations.

More recently, in *Hill v. Colorado*, 530 U.S.703 (2000), this Court upheld an statute that constituted an outright prohibition on speech near health care facilities. This Court did not review the ordinance in terms of prior restraint analysis and did not require that the government affirmatively go to court before being able to restrict the speech at issue. Surely an ordinance which seeks only to reasonably regulate city streets should not be treated more harshly than an actual ban on speech.

B. The Eleventh Circuit's Action

The Court of Appeals, however, likened the Gainesville ordinance to the *censorship* scheme in *Freedman*. It thus concluded its review of the ordinance must start with the original *Freedman* decision. Amici respectfully disagree and assert that, even without this Court's precedents mentioned above, the Gainesville ordinance cannot be considered a *censórship* scheme.

Black's Law Dictionary defines "*censor*" as "[o]ne who examines publications, films, and the like for objectionable content." Black's Law Dictionary 224 (6th Edition 1990). "*Censorship*" is defined as "[r]eview of publications, movies, plays, and the like for the purpose of prohibiting the publication, distribution, or production of material deemed objectionable as obscene, indecent, or immoral." Black's Law Dictionary 224 (6th Edition 1990). The City's ordinance, rather than *censoring* activities, provides that a street closing permit will be granted,

regardless of the content of the expression contemplated by the activity, provided that the activity will not, among other things, unreasonably interfere with vehicular or pedestrian traffic flow, will not cause an imminent danger or health hazard to any person, or will not damage public or private property. These factors for denying a permit do not mention, much less focus on, the content of the speech for which the street closure is sought. Because the ordinance is content neutral, it cannot be considered a *censorship* scheme.

Even under a prior restraint analysis, this Court has not required all three *Freedman* factors to be met in the context of content-neutral schemes. In *FW/PBS v. City of Dallas*, 493 U.S. 239 (1990), a case involving the licensing of a sexually oriented business, five members of this Court agreed that it was unnecessary for the permitting authority to bear the burden of initiating judicial proceedings when the permitting scheme is content neutral. (See Opinion of O'Connor, J. joined by Stevens & Kennedy, J.J., "In *Freedman*, the censor was *engaged in direct censorship of particular expressive material.* Under our First Amendment jurisprudence, such regulation of speech is presumptively invalid and, therefore, the censor in Freedman was required to carry the burden of going forward to court if the speech was to be suppressed . . . ." *FW/PBS*, 493 U.S. at 229 (emphasis added). See also, dissenting opinion of White, J. joined by Rehnquist, C.J., "I would offer that *Freedman* is inapplicable to the Dallas scheme." *FW/PBS,* 493 U.S. at 244.) Similarly, this content-neutral permitting scheme, if it is to be evaluated under prior restraint analysis, should not be required to meet all three procedural safeguards set forth in *Freedman*.

Because of the Eleventh Circuit's misapplication of this Court's precedents, amici respectfully request that the petition for certiorari be granted.

II. THE CITY OF GAINESVILLE, FLORIDA'S PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH OTHER UNITED STATES COURTS OF APPEALS' DECISIONS

The Eleventh Circuit's holding also is inconsistent with the holdings of other courts of appeals. Even if the Eleventh Circuit had not relied on a misapplication of Supreme Court precedent, its divergence from the reasoning of other courts of appeals warrants the granting of certiorari in this case.

Most recently, the Seventh Circuit, in *MacDonald v. City of Chicago*, 243 F.3d 1021 (7th Cir. 2001), upheld a city parade ordinance, concluding it was a valid time, place and manner regulation. The case notes the existence of an apparent conflict between *Cox* and *FW/PBS*, and suggests the difference in analysis lies in the unfettered discretion allowed governmental officials under *FW/PBS*. *MacDonald*, 243 F.3d at 1029-30 (citing *Graff v. City of Chicago*, 9 F.3d 1309, 1334-5 (7th Cir. 1993)). As in *MacDonald*, such discretion is missing in this case. The Seventh Circuit also noted Justice O'Connor's comment regarding *Freedman* that *there* the censor was engaged in direct censorship. *MacDonald* 243 F.3d at 1036. As in *MacDonald*, that is not the case here, or with the myriad of other local ordinances governing street closures. The court also noted the third factor in *Freedman* is

unworkable in the context of street closures. *MacDonald* 243 F.3d at 1036. Assume a city receives a request to close a street, but determines it should not grant this request because of the burden on the city infrastructure (clogged streets during rush hour, perhaps). Because the city would be forced to go to court in order to deny the street closure permit, it could be faced with new requests while it tried to resolve the first permit request. Uncertainty with respect to the first permit would prevent it from adequately addressing subsequent permits, requiring even further litigation. The cycle would then perpetuate itself *ad nauseam*.

In another Seventh Circuit case, decided less than a year ago, Judge Posner, joined by Judges Coffey and Easterbrook, also held permitting regulations which are required for demonstrations in city parks need not comply with *Freedman*. *Thomas v. Chicago Park District*, 227 F.3d 921 (7th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3530 (U.S. February 1, 2001) (No. 00-1249). In fact, the panel held such permitting schemes are not prior restraints at all.

In *Thomas*, the plaintiffs claimed because the regulations required permission to hold a rally in a public forum, the regulations imposed a "prior restraint" on the exercise of free speech. The court held that plaintiffs' characterization was "not helpful." *Thomas*, 227 F.3d at 923. The court noted the "historical referent of 'prior restraints' is censorship . . . which the administration of a park system does not much resemble." *Thomas*, 227 F.3d at 923-24, citing 4 William Blackstone, Commentaries on the Laws of England 151-153 (1769). The regulation challenged in *Thomas*, as here, did not authorize the permitting authority

to pass any judgment on the content of the speech or expression.

The plaintiffs in *Thomas*, as here, also argued that each time the park district denied a permit, it was required to seek judicial review. The court found this to be a misreading of *Freedman*, "which holds only that the government may not regulate the *content* of speech without judicial authorization and *so does not extend to time, place, and manner licensing systems*." *Thomas*, 227 F.3d at 926 (emphasis added). Similarly, the Gainesville ordinance, like the ordinances of local governments throughout the United States, does not regulate the *content* of speech. Rather, this ordinance and its other local government counterparts are legitimate time, place, and manner regulations.

Further, the court noted a park is a limited public space in that many demands are made of it, not all of which can be accommodated at all times for all purposes. The court went on to note competing interests cannot be weighed in the abstract, except in the grossest sense, and a court must pause before striking down a permit regulation on a facial challenge. *Thomas*, 227 F.3d at 924 (citations omitted).

Even if content-neutral time, place and manner ordinances were to be reviewed as prior restraints under the *Freedman* standard, only the first two safeguards are essential. Several other courts of appeals have recognized this. The Second Circuit in *Beal v. Stern*, 184 F.3d 117 (2nd Cir. 1999), held content-neutral regulations need only comply with two of the *Freedman* factors: the requirement that a decision be made within a specified and reasonable

time period, and the assurance that a prompt and final judicial review will be available.

The facts of the *Beal* case are strikingly similar to those in this case. In *Beal*, the plaintiffs sued because they were denied a permit to allow to hold a rally in New York's Washington Square Park. The district court held the permit requirement was content neutral and not a prior restraint, but rather, a reasonable time, place and manner restriction. The Second Circuit, while finding the regulations to be a prior restraint, relied on *FW/PBS* in holding content-neutral regulations need not comply with *Freedman*'s requirement that the permitting authority bear the burden of initiating judicial proceedings upon the denial of a permit.

Similarly, the First Circuit held a prior restraint system is permissible if it contains certain safeguards. *Jews for Jesus, Inc. v. Massachusetts Bay Transportation Authority*, 984 F.2d 1319 (1st Cir. 1993). Relying on *FW/PBS*, the court held content-neutral regulations must only limit the time for issuing authorizations and must allow for prompt judicial review. *Jews for Jesus, Inc.*, 984 F.2d at 1327.

As the above cases show, in addition to the Eleventh Circuit's divergent legal reasoning, the decision has dangerous policy implications for local governments. The decision will severely hinder local governments' ability to effectively regulate their streets. Requiring local governments to affirmatively engage in judicial proceedings every time they deny a permit to use a public forum will require that local governments devote significant manpower

and financial resources to filing actions in state or federal courts.

While amici recognize that public streets are quintessential public fora, amici submit local governments do not lose all ability to regulate these fora because of their "quintessential" nature. Public streets are also vital to the orderly transport of people and goods, and this dual purpose must be recognized. Local governments must be able to control the use of streets so that both purposes can be accommodated. In today's society, where we are continuously bombarded by reports of overcrowded streets and vehicular congestion, local governments must be able to freely plan the appropriate time to close streets for public demonstrations.

As a result of the Eleventh Circuit's decision, the courts will be turned into ad hoc permitting authorities, determining who can march when and where. Local governments will be forced to relinquish control of their public spaces to the whims of every person or organization seeking to use those spaces, at any time and for any circumstance. Under the Eleventh Circuit's rationale, local governments have lost all control over these fora.

CONCLUSION

For the foregoing reasons, amici join the City of Gainesville in its request that the Court grant the petition for certiorari in the above referenced case.

Respectfully submitted,

Henry W. Underhill, Jr.
General Counsel/Executive Director
International Municipal Lawyers Association
1110 Vermont Avenue, N.W.
Suite 200
Washington, D.C. 20005
(202) 466-5424
Counsel of Record

Lani L. Williams
Associate Counsel
International Municipal Lawyers Association
1110 Vermont Avenue, N.W.
Suite 200
Washington, D.C. 20005
(202) 466-5424

Harry Morrison, Jr.
General Counsel
Florida League of Cities, Inc.
P.O. Box 1757
Tallahassee, Florida 32303-1757
(850) 222-9684

W. Scott Gabrielson
City Attorney
Jody Litchford
Chief Assistant City Attorney
City of Orlando, Florida
City Hall, Third Floor
400 South Orange Avenue
Orlando, Florida 32801-3302
(407) 246-3470

Susan Pruett
General Counsel
Georgia Municipal Counsel
Georgia Municipal Association
201 Pryor Street S.W.
Atlanta, Georgia 30303
(404) 688-0472